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Nos. 05-5224 and 05-5705

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IN THE

Supreme Court of the United States

ADRIAN MARTELL DAVIS,
Petitioner,

v.

WASHINGTON,
Respondent.

HERSHEL HAMMON,
Petitioner,

v.

INDIANA,
Respondent.

On Writs of Certiorari to the Supreme Courts of Washington and Indiana

BRIEF OF *AMICI CURIAE* THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, INDIANA AND WASHINGTON COALITIONS AGAINST DOMESTIC VIOLENCE, LEGAL MOMENTUM, *ET AL.* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici include over fifty non-profit organizations devoted to remedying domestic violence through legal, legislative, and policy initiatives, as well as organizations and individuals providing shelter, advocacy, and legal and counseling services to survivors of domestic violence. *Amici* collectively have hundreds of years of experience working with survivors of domestic violence, including undertaking extensive efforts to improve the justice system's response to victims of domestic violence.

Amici are extremely concerned about the impact of the *Crawford* case on the ability of the State to prosecute domestic violence, hold batterers accountable, and provide protection to victims and their children. For these reasons, therefore, *Amici* are submitting this brief in support of the Respondents.[2]

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici Curiae* state that no counsel representing a party authored this brief in whole or in part, and no person or entity other than the *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Pursuant to Sup. Ct. R. 37.3(a), counsel of record for both Petitioners and Respondents have consented to the filing of this brief in letters that have been lodged with the clerk. The identities and interest of *Amici* are described in Appendix A to this brief.

SUMMARY OF ARGUMENT

These cases present an opportunity to clarify the uncertainty created by *Crawford v. Washington*, 541 U.S. 36 (2004), which has led many prosecutors to drop domestic violence charges or seek to compel victims of abuse to testify under extreme duress. Adhering to the original meaning of the Confrontation Clause does not require this Court to ignore the brutal reality of domestic violence or permit batterers to evade prosecution by wielding the Clause as a sword against their victims.

Domestic violence is a pervasive problem with its roots in centuries of legal and social norms sanctioning men's use of violence in the family. Due to the judicial system's historic reluctance to prosecute these crimes and its inability to protect victims from the weapons of control available to batterers, many abused women are unwilling or unable to testify in criminal proceedings. Over time, the criminal justice system has recognized the forces that work to prevent victims from testifying and established alternative means to obtain reliable evidence. The resulting practice of "evidence-based" prosecution ensures that violent abusers are held accountable when their own conduct makes the victim's testimony impossible to obtain. In the short time since *Crawford* was decided, however, many prosecutors and courts have responded by dropping or dismissing charges in a disturbing range of cases. Adoption of a broad definition of "testimonial" will unquestionably further cripple the potential for evidence-based prosecution, all but ensuring that many violent criminals go unpunished and undeterred.

The Confrontation Clause addressed a specific evil identified by the Framers: unchecked State inquisitorial power designed to use out-of-court testimony from a witness in order to deprive the defendant of his opportunity to confront his accuser in court. In domestic violence prosecutions, a different evil exists: here, the defendant, not the State, seeks

to silence the key witness. In adopting the Confrontation Clause, the Framers did not and could not have fully anticipated this result, in which the only or key witness is subject to the control and coercion of the accused.

Determining the application of the Confrontation Clause to domestic violence—a phenomenon that was widespread at the time the Clause was adopted and whose effects on the judicial process were unexamined—necessarily involves "some degree of estimation." *Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004). Nonetheless, a definition of "testimonial" that is faithful to the original purpose of the Confrontation Clause will continue to allow some forms of evidence-based prosecution of domestic violence cases while protecting constitutional safeguards and preserving the integrity of the adversary process. *E.g.*, *id.* at 51 ("'*ex parte* in-court testimony or its functional equivalent'") (citation omitted); *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment) ("extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"). By contrast, Petitioners' over-broad definition would sharply undermine the State's ability to protect victims and hold batterers accountable; indeed, it would be incompatible with judicial fairness.

For these reasons, the judgments in *Davis v. Washington* (05-5224) and *Hammon v. Indiana* (05-5705) should be AFFIRMED.

ARGUMENT

I. THE LEGAL AND SOCIAL HISTORY OF DOMESTIC VIOLENCE CREATES UNIQUE BARRIERS TO PROSECUTION.

Domestic violence[3] is a profound social problem with far-reaching consequences.[4] It accounts for a substantial

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[3] We define domestic violence as the physical, sexual, psychological, and/or emotional abuse of a victim by her intimate partner, with the goal of asserting and maintaining power and control over the victim. *See, e.g.*, Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L. Rev. 853, 853 (1994); Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 Drake L. Rev. 295, 300 (2004). While domestic violence also plagues the elderly and children, this brief focuses on intimate partner violence. Women may perpetrate domestic violence, and violence also occurs in same sex relationships; the vast majority of victims, however, are women and their attackers are men. *See, e.g.*, Callie Marie Rennison, Bureau of Justice Stat., U.S. Dep't of Justice, Crime Data Brief: *Intimate Partner Violence, 1993-2001* 1 (NCJ 197838, Feb. 2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf (women are 85% of victims).

[4] Approximately one in four women, and 7% of men, report having been physically assaulted by a current or former intimate partner. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control & Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* iv (NCJ 183781, Nov. 2000), http://www.ncjrs.gov/pdffiles/172837.pdf. Estimates of the number of American women assaulted and/or raped each year by an intimate partner range from 1.5 million to 4 million. *Id.* (1.5 million); Am. Psychol. Ass'n, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 10 (1996) (4 million). At least half of women murdered are killed by intimates. Violence Pol'y Ctr., *When Men Murder Women: An Analysis of 2003 Homicide Data* 3 (Sept. 2005), http://www.vpc.org/studies/wmmw2005.pdf (92% of female victims were murdered by someone they knew; 62% of these were killed by husbands or intimate partners).

proportion of criminal justice system activity.[5] Characterized by a pattern of terror, domination and control, domestic violence inexorably obstructs victims' efforts to escape abuse and achieve safety. The legal system has historically condoned (or, at best, ignored) domestic violence. Understanding this historical context is essential to properly applying the Confrontation Clause to contemporary cases.

A. Domestic Violence is Characterized by a Pattern of Terror, Domination and Control.

While physical violence is ordinarily the sole aspect of domestic violence that reaches the criminal justice system, battering includes many other forms of coercion and control. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 93 (1991) ("battering is power and control marked by violence and coercion"). Most battered women are subjected to "an *ongoing* strategy of intimidation, isolation, and control that extends to all areas of a women's life, including sexuality; material necessities; relations with family, children, and friends; and work." Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 986 (1995). Batterers' means of disempowering and controlling their victims include not

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[5] Violence between intimate partners (spouses and boyfriends and girlfriends) accounted for 34% of all violent crimes recorded by police in eighteen states and the District of Columbia. Matthew R. Durose et al., Bureau of Justice Stat., U.S. Dep't of Justice, *Family Violence Statistics* 29 (NCJ 207846, June 2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs05.pdf. In a study of eleven large counties during May 2000, approximately one third of felony assault charges involved family violence (broadly defined). *Id.* at 45.

only violence, but also sexual, emotional and economic abuse, psychological intimidation, social isolation, and threats to and about the children or other family members. *See* Appendix 65a, Letter 20[6] (victim "cut off from friends and family" and "truly believed" she had "no one to help"); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1204-06 (1993). Batterers often issue lists of "rules" that their partners and children are required to obey, at the risk of invoking violence. Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. Rev. 2117, 2126-29 (1993) (describing batterer and victim as "the Ruler and the Ruled"). *See also* App. 68a, Letter 21 (victim told she "didn't know how to be a woman," criticized for the way she "cooked, washed clothes, [wore] hair, raise[d their] child, everything"); App. 57a, Letter 11 (victim assaulted because she "didn't launder correctly").

Not surprisingly, victims' efforts to escape their abusers often lead to escalations of violence, owing to the threat such efforts pose to the batterer's control of the victim. Research consistently documents that "the greatest risk for serious injury or death from violence is at the point of separation or at the time when the decision to separate is made." Am. Psychol. Ass'n, *supra*, at 39; App. 49a, Letter 6 (describing murders of mothers and children after separation from abusers); Mahoney, *supra*, at 5-6, 65-68 (detailing stories of post-separation attacks). Indeed, 75% of the most serious injuries and deaths occur after battered women leave their abusers. *See* Barbara Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43

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[6] Appendix B is a compendium of letters from prosecutors, law enforcement officers, advocates, and victims about their relevant experiences in domestic violence cases.

Juv. & Fam. Ct. J. 34 (1992) (citations omitted). Batterers often specifically instruct their victims never to call the police. *See* App. 39a, Letter 1 (victim told by her batterer that "if she ever called 911 on him, he would come back and kill her"). Pursuing prosecution, thus, is not only an assertion of autonomy, it directly defies the abuser's control, exposing the victim to considerable risk of violence.

B. The Legal System Has Historically Condoned or Ignored Domestic Violence.

Batterers' ability to control their victims has been facilitated by the failure of the legal system to respond adequately to incidents of domestic violence. The Violence Against Women Act of 1994 was enacted by Congress after extensive legislative hearings documenting the historic and pervasive failure of state criminal justice systems to respond appropriately to domestic violence and sexual assault, including substantial documented gender bias in the courts. *The Violence Against Women Act of 1993*, S. Rep. No. 103-38, at 41-47 (1993); G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing and Recreating the Battered Mother in Child Protective Proceedings*, 22 Harv. Women's L.J. 89, 90 (1999) (VAWA reflects Congress' finding that "the state, through nonfeasance and misfeasance, contributes to the systemic abuse of women within the family"). Such findings were not new. *See* U.S. Dep't of Justice, *Attorney General's Task Force on Family Violence: Final Report* 16-18 (Sept. 1984); Gail A. Goolkasian, Nat'l Inst. of Justice, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies* 55 (May 1986) (describing historical reluctance of prosecutors to take domestic violence cases seriously).

Modern judicial inadequacies are in part a product of history. Until approximately the late 19th century, wives were legally subordinated to their husbands. "By law, a husband acquired rights to his wife's person . . . . A wife was

obliged to obey and serve her husband . . . . As master of the household [he] could command [her] obedience, and subject her to corporal punishment or 'chastisement' if she defied his authority." Reva B. Siegel, *'The Rule of Love': Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2122-23 (1996); 1 William Blackstone, *Commentaries* *421, *444-45. Reported decisions endorsed Blackstone's "modest chastisement," *Bradley v. State*, 1 Miss. (1 Walker) 156, 158 (1824) and approved of force "to control [a wife's] unruly temper." *State v. Black*, 60 N.C. 262 (1864). *See generally* Siegel, *supra*, at 2122-25 & n.25 (collecting cases); Rebecca Emerson Dobash & Russell P. Dobash, *Violence Against Wives* 31-74 (1979) (surveying history of wifebeating and laws through the early 20th century).

More recently, although the legal system no longer endorsed these antiquated gender distinctions, police and prosecutors continued a policy of indifference to domestic violence victims, fueled by society's belief in the trivial and non-criminal nature of this abuse. *See* Dobash & Dobash, *supra*, at 207-22; James B. Halsted, *Domestic Violence: Its Legal Definitions, in Domestic Violence: The Changing Criminal Justice Response* 143, 155 (Eve S. Buzawa & Carl G. Buzawa eds., 1992). Up until at least the 1980s, police typically ignored domestic violence calls or purposely delayed their response. *See AG's Task Force Final Report*, *supra*, at 16-18; Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. of Crim. L. & Criminology 46, 46-60 (1992); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849, 1857 (1996). Studies conducted in the 1980s and 1990s found that arrests occurred in only 3 to 14% of all intimate partner cases to which officers actually responded. Eve S. Buzawa & Carl G. Buzawa, *supra, Introduction, in Domestic Violence: The Changing Criminal Justice Response* (1992) at vii, xvi. Similarly, prosecutors historically resisted prosecuting abuse,

downgraded severe violence to misdemeanor charges, and were all too eager to drop cases when victims expressed any ambivalence.[7] Only recently, under pressure from domestic violence advocates, have police and prosecutors around the country begun to take domestic violence seriously and to develop effective means of prosecuting it. *See* Sec. II.B., *infra*.

II. BATTERING CREATES A DYNAMIC THAT COMPROMISES THE TRUTH-GATHERING FUNCTION OF THE PROSECUTOR AND REQUIRES THE USE OF ALTERNATIVE RELIABLE EVIDENCE.

Because victims of domestic violence remain very much at risk after separation or reporting of their abuse, and because the legal system has often failed to protect them, many victims are ambivalent or fearful about prosecution. They report being threatened by their abusers that their children will be hurt, App. 54a, Letter 9, fearing that they will be killed and their children taken, App. 49a, Letter 6, and feeling that "the court system doesn't care," App. 64a, Letter 19. *See also* App. 54a, Letter 9 (defendant called victim at work notwithstanding no-contact order and "threatened that if she did not drop the charges, he would continue to harass her and her kids" and that "[h]e tried to kill her before, but . . . the next time he [would] not fail to do so"); App. 56a, Letter 10 (defendant dissuaded victim from

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[7] As one prosecutor stated: "When I look back at how it used to be with battered women, I can see that it was a self-fulfilling prophesy. We'd file if she really wanted us to, but we knew that she'd want us to drop charges later . . . we may have even told her so. Then we sent her back home, often back to her abuser, without any support or protection at all. Sure enough, she wouldn't follow through and we'd think, 'It's always the same with these cases.'" Goolkasian, *supra*, at 55.

testifying by telling her he'd kill her). Indeed, one survivor writes:

> [I]t's not easy to testify against someone you love, someone who has hurt you, someone you are afraid of, someone you depend on, someone you have a child with or someone who scares the hell out of you. For me . . . all of those things are in one person.

App. 81a, Letter 32.

A. Domestic Violence Places Most Battered Women in an Untenable Position With Regard to Criminal Prosecution.

While some battered women eagerly pursue criminal prosecution as a means of seeking safety and accountability, many others fear participation in the judicial process, for several reasons. A paramount concern is fear for their safety and that of their children. James Ptacek, *Battered Women in the Courtroom* 145-49 (1999) (detailing fear of retaliation). Studies back this up. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. R. 747, 769 (2005) (threats of retaliatory violence in as many as half of all cases; 30% of battered women reassaulted while batterer being prosecuted). *See generally* Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 Am. U. J. Gender Soc. Pol'y & L. 465, 467 n.4, 476-77 (2003).

> [W]hen it came time to press charges . . . I got scared to go to court and face him. He would threaten me that if he went to jail I would be sorry.

App. 76a. Letter 27.

> [J]ust the thought of having to testify against him made me sick—I shook uncontrollably the first three times I was there . . . I can't begin to explain how scary it is to have to see your abuser again and for him to see you, especially in a courtroom, because there's no guarantee of safety once you leave it.

App. 75a-76a, Letter 25.

Victims who take action against or leave an abuser also risk losing their children. One study found that 25% of batterers directly threatened kidnapping the victim's children if legal action was pursued; they also frequently threatened to lie or exaggerate the victim's personal problems to protective services. Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 3, 88 (James A. Inciardi ed., 2d ed. 1996); Ptacek, *supra*, at 140 (more than half the time, batterers threaten to take children, file for custody, or report victim to social services). Surprisingly often, when the parties separate, batterers win joint or sole custody of children. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 A.U. J. of Gender, Soc. Pol. & Law 657, 662 n.19 & accompanying text (2003).

In addition, many victims face untenable economic choices. *See* Buzawa & Buzawa, *supra*, *Domestic Violence: The Criminal Justice Response* (2d ed. 1996) at 88-89 (finding economic threats made by 42% of abusers). Where victims are unemployed or earning very little, the threat of loss of financial support can be critical. *Id.* (31% of the victims were unemployed and 67% earned under $10,000). Even victims who are employed regularly face myriad acts of sabotage, harassment, and interference designed to undermine their own access to income. *See, e.g.*, Washington State University et al., *Intimate Partner Violence . . . It's a Work-place Issue* 17 (Jan. 2005), http://www.caepv.org/member

center/files/Intimate%20Partner%20Violence-A%20Workplace%20Issue%20Spokane%20Co.%20(January%202005).pdf (34% of employed female intimate partner violence victims report work disruption by partner's violence); Jody Raphael & Richard M. Tolman, *Trapped In Poverty; Trapped By Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare* (Apr. 1997), http://www.ssw.umich.edu/trapped/ pubs_trapped.pdf.

Perhaps the most pervasive aspect of battering that undermines victims' ability to testify is trauma. "The common denominator of psychological trauma is a feeling of 'intense fear, helplessness, loss of control, and threat of annihilation.'" Judith Herman, *Trauma and Recovery* 28, 32 (1992) (citation omitted). After the concept of post-traumatic stress disorder gained legitimacy in the 1980s, it became "clear that the psychological syndrome seen in survivors of rape, domestic battering, and incest was essentially the same as the syndrome seen in survivors of war." *Id.* at 32. Trauma can profoundly disable a person's ability to lead a normal life and can short-circuit their emotional and psychological functioning.

Most importantly, "[e]fforts to seek justice or redress often involve further traumatization," because, among other things, "this decision engages the survivor with a legal system that may be indifferent or hostile to her." *Id.* at 72, 165. Testifying in court forces a victim to face her terrorizer, retell the trauma to his face, and endure potentially aggressive cross-examination. App. 56a, Letter 9 (every time victim sees her boyfriend or even a photograph, she re-lives both the rape and the battering); App. 60a-61a, Letter 14; App. 63a, Letter 18. All of these phenomena are massive triggers for re-traumatization. As one survivor put it:

> Today, even ten years later, after years of counseling to become whole again—I still have a hard time facing him in court in matters involving the children. Over ten years after my last beating it still makes me throw-up when I have to face him. I break out in a horrible, drenching cold sweat. I shake from the tips of my fingers to toes, [which] I usually have to consciously place on the ground with force to stop my heels from clacking in the courtroom. . . . I often have to seek medical attention afterwards for migraines.

App. 67a, Letter 20. In short, "if one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law." Herman, *supra*, at 72; Epstein et al., *supra*, 11 Am. U. J. L. & Soc. Pol. at 474-75.

The net effect of all these obstacles is that battered women are far more likely to avoid participation in criminal trials or recant their accusations than any other crime victims. Lininger, *supra*, at 768. It is estimated that battered women recant or refuse to cooperate with the prosecution approximately 80-90% of the time. *Id.*; Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3-4 (2002). A study in New York City found that 80-90% of victims in domestic violence cases refuse to cooperate. Richard R. Peterson, *Combating Domestic Violence in New York City: A Study of DV Cases in the Criminal Courts*, CJA Final Report 9-10 (Apr. 2003), http://www.nycja.org/research/reports/ressum43.pdf. In the 1980s and 1990s, as many as 60-80% of domestic violence cases were abandoned for this reason. Lininger, *supra*, at 771 n.121; Buzawa & Buzawa, *supra*, *Domestic Violence: The Criminal Justice Response* (2d ed. 1996) at 87. In Brooklyn

and Milwaukee, the most common reason for dismissal of domestic violence prosecutions was victims' failure to make court appearances or to testify against the defendants. Lininger, *supra*, at 769; App. 41a, Letter 1 (in 2005 in Milwaukee, 96% of dismissals occurred because victims did not appear in court for trial).

B. Evidence-Based Prosecution is Often the Only Effective Means to Hold Batterers Criminally Accountable.

Over the past three decades, concerted pressure from advocates and policy-makers[8] has led many police departments and prosecutors to revise their practices with respect to domestic violence. The development of evidence-based prosecution is among the most important of these reforms. Evidence-based prosecution focuses on the gathering of reliable evidence such as 911 tapes, photographs, medical records, spontaneous declarations by the victim to the officers, admissions by the defendant, neighbors' testimony, relatives' testimony, and general police officer testimony related to the case and the subsequent investigation, in order to make a case that does not depend on

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[8] The Department of Justice, the National Council of Juvenile and Family Court Judges, the International Association of Chiefs of Police, and the ABA have all issued authoritative policy documents supporting more aggressive criminal justice responses, including mandatory or pro-arrest policies, no-drop and evidence-based prosecution practices. *See, e.g., AG's Task Force Final Report*, *supra*; Goolkasian, *supra*; National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice* (1990) and *Family Violence: State-of-the-Art Court Programs* 55-86 (1992); International Association of Chiefs of Police, National Law Enforcement Policy Center, *Model Policy on Domestic Violence* (1996 & 1997); Am. Bar Ass'n, *The Impact of Domestic Violence On Your Legal Practice: A Lawyer's Handbook* 340-45 (2d ed. 2004) (recommending victim support and evidence-based prosecution).

victim cooperation. *See* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1845, 1858 (2001); Casey G. Gwinn & Sgt. Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. St. U. L. Rev. 297, 313 (1993) (estimating that 60% of cases in San Diego are provable on the basis of this type of evidence).

Because it is not possible to require victims of domestic violence to testify in every case, evidence-based prosecutions have become the most effective means of furthering the compelling public interest in ensuring that violent abusers are brought to justice and victims are protected. Gwinn & O'Dell, *supra*, at 311; Epstein, *supra*, 43 Wm. & Mary L. Rev. at 1858; Corsilles, *supra*, at 877-78. In Duluth, evidence-based prosecution methods have resulted in a significant increase in the conviction rate. Mary E. Asmus, Tineke Ritmeester & Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies From Understanding the Dynamics of Abusive Relationships*, 15 Hamline L. Rev. 115, 136 (1991). In San Diego, the domestic violence unit obtains convictions in over 2000 cases every year using an evidence-based prosecution model. Gwinn & O'Dell, *supra*, at 314. About 30-40% of jurisdictions in the country have followed San Diego's evidence-based approach. Mark Hansen, *New Strategy in Battering Cases: About a Third of Jurisdictions Prosecute Even Without Victim's Testimony*, 81 ABA J. 14 (Aug. 1995). Without evidence-based prosecution, too many cases would be impossible to prosecute. *Cf.* Sec. III.A., *infra*.[9]

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[9] The ACLU and NACDL amicus briefs both argue that domestic violence prosecutions can be accomplished by other means, such as providing better support for victims, including the provision of safe living arrangements, more comprehensive social services and better communications about the case. Brief *Amicus Curiae* of the American Civil Liberties Union, the ACLU of Washington and the Indiana Civil Liberties

III. AN OVERLY EXPANSIVE VIEW OF THE TERM "TESTIMONIAL" WILL CONVERT THE CONFRONTATION CLAUSE FROM A SHIELD INTO A SWORD TO BE WIELDED AGAINST VICTIMS OF DOMESTIC VIOLENCE.

The rights accorded to defendants under the Confrontation Clause were intended as a "shield" to protect the defendant from potential prosecutorial abuses. *See Taylor v. Illinois*, 484 U.S. 400, 410 (1988). Adopting an overly expansive view of "testimonial" statements, as urged by Petitioners, will convert this "shield" into a sword to be wielded by batterers to silence their victims, crippling the ability to prosecute domestic violence cases and prejudicing the adversary process. Meanwhile, battered women will be subjected to increased state coercion, putting them at risk of further physical jeopardy or re-traumatization.

A. An Overly Expansive Definition of a "Testimonial" Statement Will Cripple the Prosecution of Batterers.

While *Crawford* is relatively recent, evidence has already emerged that it has significantly undermined the prosecution of domestic violence cases. App. 48a, Letter 5 ("the

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Union in Support of Petitioners at 22-24; Brief of *Amici Curiae* the National Association of Criminal Defense Lawyers and the Public Defender Service for the District of Columbia in Support of Petitioner Hammon at 28-29. While *Amici* agree that improved support and communication with victims by prosecutors' offices is important, it alone cannot possibly eliminate the dangers or trauma that impair victims' participation. Moreover, it is unrealistic to suggest that under-funded prosecutors' offices should somehow provide funds for safe housing and ensure comprehensive social services for victims. Indeed, in *Amici*'s experience, even existing witness protection programs are rarely (if ever) available for domestic violence victims.

Crawford opinion has had a devastating effect on my ability to prosecute these [domestic violence] cases"); Lininger, *supra*, at 749.[10] An extensive survey of over 60 prosecutors' offices in California, Oregon and Washington, provides valuable information about the impact of *Crawford*. *Id.*[11] Among the results: 63% of respondents reported that the *Crawford* decision significantly impeded prosecutions of domestic violence; 76% indicated that after *Crawford*, their offices were more likely to drop domestic violence charges when victims recant or refuse to cooperate; and 65% reported that victims of domestic violence are now less safe in their jurisdictions than during the era preceding the *Crawford* decision. *Id.* at 750.

Additional reports from numerous jurisdictions echo these findings, and indicate that prosecutors across the country are dropping cases, or pleading them down to lower offenses, because of *Crawford*. *See* Lininger, *supra*, at 749 ("within days—even hours—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past") (footnotes omitted); Robert Tharp, *Domestic Violence Cases*

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[10] *See also* Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 608 (2005) ("*Crawford* has disrupted domestic violence prosecutions to a degree not seen in any other area. It erected a 'stop sign' in front of most of this evidence [evidence routinely used in victimless prosecutions], which combined with its reluctance to treat excited utterances as a historic exception to confrontation, has caused massive disruption and great uncertainty.") (footnote omitted).

[11] The survey was conducted by researchers at the University of Oregon School of Law between October 22, 2004, and January 31, 2005. The survey involved 64 counties, covering approximately 90 percent of the total population of California, Oregon, and Washington. Lininger, *supra*, at 749.

Face New Test: Ruling That Suspects Can Confront Accusers Scares Some Victims From Court, Dallas Morning News, July 6, 2004, at 1A (half of all domestic violence cases set for trial in Dallas are thrown out because of *Crawford*). A Denver prosecutor also recounted letting a man accused of viciously beating his girlfriend plead to lesser charges after the accused had called his girlfriend from jail and threatened to kill her when he got out. Sarah Huntley, *Ruling Ties Prosecutors' Hands; Cross-Examination Right Reaffirmed*, Rocky Mountain News, Feb. 8, 2005, at 7S. "Without *Crawford*," the prosecutor stated, "I wouldn't have made that offer . . . . I was left with the choice, if the victim didn't show, of possibly losing the whole case." *Id.*[12] An Assistant District Attorney from Georgia summarized: "the ultimate impact of Crawford . . . is crystal clear—that is, if domestic violence victims do not testify, no conviction follows." App. 44a-45a, Letter 2.

Moreover, a significant number of domestic violence-related convictions have been overturned because of *Crawford*.[13] These cases illuminate the very real consequences

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[12] *See also* Leonard Post, *Prosecutors Feel Broad Wake of "Crawford" ; Child Abuse Cases, 911 Calls Affected*, Nat'l L.J., Dec. 13, 2004, at 1 ("Since Crawford, tapes of 911 calls are no longer being routinely admitted under the excited-utterance exception to the hearsay rule, asserted Deirdre Bialo-Padin, chief of the district attorney's domestic violence bureau in Brooklyn, N.Y. 'Some judges are being very conservative,' she said.").

[13] *See, e.g., People v. Adams*, 16 Cal. Rptr. 3d 237 (Cal. Ct. App. 2004) (vacating conviction of boyfriend for inflicting corporal injury upon a cohabitant by battering her, pushing her to the ground and pushing his knee down into her abdomen while she was pregnant, because introduction of the girlfriend's statements to the police violated *Crawford*), *review granted*, 99 P.3d 2 (Cal. 2004); *Miller v. State*, 615 S.E.2d 843 (Ga. Ct. App. 2005) (overturning husband's convictions for terroristic threats and obstructing a person making an emergency phone call because failure of wife to testify at trial meant introduction of her statements to police officers violated *Crawford*, but upholding convictions for aggravated assault and battery), *accord* App. 43a-45a, Letter 2 (*id.*); *State*

that *Crawford* has had on state efforts to prosecute crimes of domestic violence. The recent ruling by the United States Court of Appeals for the Ninth Circuit in *Bockting v. Bayer*, 399 F.3d 1010, *amended*, 408 F.3d 1127 (9th Cir. 2005), which applies *Crawford* retroactively, suggests that *Crawford* is not just an impediment to future convictions, but has the potential to undo many past convictions as well.

B. Making Criminal Prosecution Dependent on Victims' Testimony Will Deliver Control of Domestic Violence Cases into the Hands of Abusers.

If this Court adopts an overly expansive standard for "testimonial" statements it will likely strengthen the power that batterers already wield against their victims once charges are filed. Knowing the impact their actions will have on the prosecution, batterers may decide to disregard no-contact orders and confront their victims outside the courtroom in an

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v. Grace, 111 P.3d 28 (Haw. Ct. App.) (overturning husband's conviction for abuse of a family member due to *Crawford* violation), *cert. denied*, 107 Haw. 348 (2005); *People v. Victors*, 819 N.E.2d 311 (Ill. Ct. App. 2004) (reversing boyfriend's conviction for domestic battery because introduction of victim's statements to police officer that he pushed, punched and choked her violated *Crawford*), *appeal denied*, 214 Ill. 2d 549 (2005); *State v. Siler*, No. 02 COA 028, 2005 Ohio App. LEXIS 5933, at *16 (Ohio Ct. App. Dec. 13, 2005) (overturning husband's murder conviction of wife because statements made by the couple's son describing his father's hanging of his mother to a police officer violated *Crawford*); *Mason v. State*, 173 S.W.3d 105 (Tex. Ct. App. 2005) (overturning boyfriend's assault conviction because introduction of victim's statements to police officer's violated *Crawford*); *State v. Powers*, 99 P.3d 1262 (Wash. Ct. App. 2004) (overturning conviction for violating a domestic protection order because victim's 911 call telling operator the defendant had come to her home was testimonial).

effort to intimidate them, "wielding the *Crawford* decision as [a] sword." App. 41a, Letter 1.

It is a predictable fact of life in domestic violence cases that once an arrest is made, the abuser can be expected to mobilize all the means at his disposal to force the victim into silence and stop the prosecution. *See* Gwinn & O'Dell, *supra*, at 310 ("abusers [became] more violent and aggressive toward the victim when they learned that she controlled the outcome of the criminal prosecution."); Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of their Abusers?*, 7 Wm. & Mary J. Women & L. 383, 394 (2001) (quoting a prosecutor who said "I had one case where the woman came in [seeking] to drop [the case] and had a hand written note from the defendant that said something like, 'My court dates are July 1 and 15. Go to the prosecutor and tell them that you want the case dismissed. They'll dismiss it.'"); *See* App. 53a, Letter 8 ("defendant had a friend come to his house the day of court and 'baby-sit' the victim to make sure she didn't come to court for the trial"); App. 50a-51a, Letter 6; App. 42a, Letter 1. Batterers—already intimately familiar with the vulnerabilities of their victims—are skilled at honing in on pressure points.[14] One attorney described this scenario:

> '[If] the defendant knows that the woman has the capability of dropping the charge, he's going to beat her, he's gonna make her eat the restraining order . . . he'll make her crawl on the ground and eat cigarettes[,] and

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[14] As discussed in Section II.A., *supra*, because the victim is intimately connected to the abuser, often depending on him for financial support, or sharing a home and/or children, the abuser has infinitely greater leverage over the victim than the more typical criminal defendant.

> every other kind of abuse you can imagine as long as she has the potential to drop it, that's going to happen.'

Report of the Florida Supreme Court Gender Bias Study Commission (Mar. 1990), *reprinted in* 42 Fla. L. Rev. 803, 861 (1991) (alterations in original) (citations omitted). Far too often, such tactics are rewarded. As a former prosecutor stated, "[w]hen a batterer and his defense attorney know that a victim's failure to cooperate may result in case dismissal, they control the judicial process." Hanna, *supra*, at 1891; *see* App. 56a, Letter 10 (victim threatened and "[a]s a result . . . did not appear and her case . . . was terminated.").

In sum, a broad interpretation of the Confrontation Clause greatly reduces the State's ability to go forward without victims' testimony. This will play directly into batterers' hands by exacerbating the very problem evidence-based prosecution was designed to avoid: coercion of victims by defendants, leading to a recanting of victim testimony or refusal to cooperate with prosecutors and dismissal of the charges.

C. The Doctrine of Forfeiture Does Not Adequately Solve the Problems a Broad Definition of "Testimonial" Poses for Domestic Violence Cases.

In *Crawford*, this Court stated that the doctrine of "forfeiture by wrongdoing" continues to apply where appropriate. 541 U.S. at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1870)). The forfeiture doctrine embodies the principle that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Reynolds*, 98 U.S. at 158. While *Amici* believe that forfeiture should apply

broadly to many domestic violence cases,[15] there is good reason to believe that it will often be insufficient to address the problems described above.

Forfeiture claims in domestic violence cases could arise in at least three different circumstances: (i) where the defendant engages in post-charge coercion or interference with the intent of precluding or changing the victim's testimony; (ii) where the defendant engages in post-charge abuse or intimidation but his intent is not explicit; and (iii) where the defendant does not have further contact with the victim post-charge but the victim is too traumatized, frightened or otherwise ambivalent to testify.

While forfeiture claims have been comparatively rare in domestic violence cases until now (as prior to *Crawford* the doctrine was infrequently needed), there are numerous potential obstacles to application of forfeiture.[16] Cases such as (i) above presumably present the strongest cases for forfeiture. Nonetheless, even where the defendant has threatened or re-assaulted the victim with the intent to prevent her testimony, establishing the defendant's wrongdoing is likely to be difficult if not impossible. Victims who fear participating in a prosecution are unlikely to inform the prosecutors about new episodes of abuse and even less likely

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[15] Indeed, if contrary to Respondents' and *Amici*'s urgings, this Court should decide to reverse the decisions below, *Amici* would respectfully suggest that, instead of an outright reversal, the Court remand the cases for forfeiture hearings, while providing sufficient guidance as to the broad application of the doctrine to ensure that the problems described above are avoided.

[16] Notably, neither the Petitioners nor their supporting *amici* even address forfeiture in their briefs—even when arguing that domestic violence prosecutions can still go forward--implying that they will oppose broad application of the doctrine.

to appear for a forfeiture hearing.[17] Thus, where proof of the defendant's wrongdoing depends solely on the victim's in-court testimony (*i.e.*, where neither hearsay evidence nor other witnesses are available), the testimony will be unavailable and a forfeiture argument will fail.[18]

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[17] While the majority of courts have held that forfeiture hearings, as pretrial evidentiary determinations, require the State to meet only a preponderance of the evidence standard, several courts have held that defendants' rights to confrontation are too important to be resolved in that way and have adopted a clear and convincing standard. *See, e.g., United States v. Houlihan*, 887 F. Supp. 352 (D. Mass. 1995); *United States v. Smith*, 792 F.2d 441, 442 (4th Cir. 1986) (affirming on other grounds); *People v. Geraci*, 649 N.E.2d 817 (N.Y. 1995) (adopting clear and convincing due to importance of confrontation right). *See also United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982) (describing Supreme Court precedents as mixed on this point but adopting preponderance standard); *State v. Jarzbek*, 529 A.2d 1245, 1255 (Conn. 1987) (requiring clear and convincing evidence of need to videotape child's testimony). This Court has held a preponderance standard applies for suppression hearings regarding possible misconduct by the police, *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (voluntariness of confession); *United States v. Matlock*, 415 U.S. 164, 178 (1974) (consent to search); but has held otherwise for a question involving a constitutional right relating to the reliability of evidence, *United States v. Wade*, 388 U.S. 218, 240 (1967) (requiring clear and convincing proof that in-court identification of suspect was not tainted by unconstitutional lineup). Of course, where the problem is a reluctant or terrified witness, meeting a clear and convincing standard of proof as to the reasons for her absence may be quite difficult.

[18] Moreover, proof of interference in the domestic violence context can be quite subtle. "'Battered women . . . may perceive danger and imminence differently from men . . . A subtle gesture or a new method of abuse, insignificant to another person, may create a reasonable fear in a battered woman.'" *People v. Romero*, 13 Cal. Rptr. 2d 332, 338 (Cal. Ct. App. 1992) (citation omitted). *See also* Lynn Hecht Schafran, *Why Empirical Data Must Inform Practice, in Violence Against Women: Law and Litigation* 1-58 (Frazee, Noel & Brenneke eds., 1997) (sending roses may be a message of intimidation to a victim who has made clear she wants no contact). Batterers do not need to engage in overt conduct to

The second scenario above (where defendant engages in intimidation but does not clearly express an intent to dissuade victim from testifying) poses the question of the extent to which an intent to interfere with testimony must be proven. The Federal Rule of Evidence regarding forfeiture and most state analogues expressly require proof of intent. *See* Fed. R. Evid. 804(b)(6) (requiring that the party has "engaged or acquiesced in wrongdoing that was *intended* to, and did, procure the unavailability of the declarant as a witness") (emphasis added). *See United States v. Gray*, 405 F.3d 227, 242 & n.9 (4th Cir.) (emphasizing intent requirement), *cert. denied*, 126 S. Ct. 275 (2005); *United States v. Dhinsa*, 243 F.3d 635, 653 (2d Cir. 2001) (reciting language of Rule 804(b)(6)); *People v. Melchor*, No. 1-03-3036, 2005 Ill. App. LEXIS 1123, at *40 (Ill. App. Ct. Nov. 14, 2005) (finding that a majority of the states require intent or motivation). Such an intent requirement may preclude application of forfeiture in many domestic violence cases, where abuse, harassment, or even sweet-talking causes a victim to recant or withdraw, but the defendant's intent to interfere with her testimony cannot be proven. *But cf. United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (holding that although Rule 804(b)(6) may require intent, the Sixth

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exert power over their victims. *See, e.g.*, App. 71a, Letter 23 (just seeing her abuser made the victim "shak[e] uncontrollably"); App. 56a, Letter 9 ("every time she sees her boyfriend, or even a photo, she relives both the rape and the battering"); App. 68a, Letter 20 ("While a true weapon such as a knife, or a gun may be used as part of the package, the look, the voice, or the words of the abuser serve as just as much a fear stimulator."). There is no assurance that a court will recognize that conduct that may appear innocuous to the outside eye was responsible for a victim's disappearance.

Amendment does not); *Gonzalez v. State*, 155 S.W.3d 603, 611 (Tex. Ct. App. 2004).[19]

Finally, category (iii) above represents the many domestic violence cases where there is no evidence of post-arrest interference with a witness, but the victim is unwilling or unable to testify because of the history of abuse—that history makes testifying in front of the defendant too terrifying or traumatizing. *See* pp. 12-13, *supra*. *See e.g.*, App. 63a, Letter 18; App. 63a, Letter 19. In such cases it is unlikely that the requirement that defendant's wrongdoing must be intended to prevent the witness from testifying, could be met.[20]

Few courts have addressed this precise issue, but at least one has noted that a "mere" history of domestic violence may be insufficient to merit forfeiture. *United States v. Montague*,

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[19] A related question is whether the prosecution may rely on the wrongdoing that constitutes the basis for the criminal charge, to show wrongdoing for purposes of a forfeiture claim. Many courts have held in homicide cases, that it may. *See, e.g., Garcia-Meza*, 403 F.3d at 370; *Gray*, 405 F.3d at 243. However, at least one court has held otherwise. *United States v. Mikos*, No. 02 CR 137-1, 2004 U.S. Dist. LEXIS 13650, at *16 (N.D. Ill. July 16, 2004) (describing reliance on evidence related to charge to prove wrongdoing pretrial, a "slippery slope" which opens a "very real possibility of someday substantially eroding the defendant's right to be presumed innocent"). This too will be an issue in domestic violence cases, where the prior history of abuse is often not known to the prosecution.

[20] It is not uncommon for domestic abusers to threaten their victims that they will kill them if they call the police, etc., *see* App. 39a, Letter 1, and such pre-arrest threats might well be considered in a forfeiture hearing. However, in many cases, especially if the victim is avoiding the prosecution, the prosecutors may not have information about these specific past threats. Moreover, a strict construction of the intent requirement described above would preclude consideration of pre-arrest conduct which by definition could not be aimed at interfering with these particular charges.

421 F.3d 1099, 1104 (10th Cir. 2005) (stating that "evidence of [the defendant's] pre-prosecution conduct [alone] may be insufficient to warrant application of the wrongdoing/forfeiture exception" but upholding relevance of past relationship to wrongdoing determination). *See also* Myrna Raeder, *Remember the Ladies and the Children Too*: Crawford's *Impact on Domestic Violence and Child Abuse Cases*, 71 Brook. L. Rev. 311, 361 (2005) ("forfeiture cannot be assumed without specific evidence linking a defendant to a complainant's failure to testify at trial"). *But cf. People v. Santiago*, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at **45, 52 (N.Y. Sup. Ct. Apr. 7, 2003) ("it is hard to conceive that [forfeiture] should be limited to situations in which the misconduct occurred between the date of the charge and the date of the trial"); Adam M. Krischer, *"Though Justice May Be Blind, It is Not Stupid": Applying Common Sense to Crawford v. Washington in Domestic Violence Cases*, 1 The Voice 1, 3 (Nov. 2004), *available at* http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf (arguing that the right to confrontation should be waived if the victim "is so traumatized or so threatened by the defendant that she refuses to cooperate from the start of the investigation" such that "the defendant has no need to commit any act to secure the victim's unavailability outside of the charged conduct itself").

The forfeiture doctrine, while in principle applicable, in practice may be incapable of adequately remedying the inherent pressures against victims' testimony in many domestic violence cases.

D. A Broad Interpretation of "Testimonial" Will Compel Prosecutors to Sanction Victims.

In addition to subjecting victims to increased pressure and coercion from batterers, increased reliance on victims' testimony may intensify prosecutors' use of coercive and

punitive measures to force victims to cooperate. Prosecutors generally make every effort to obtain the assistance of the victim-witness in domestic violence cases. While committed prosecutors must utilize evidence-based prosecution in order to effectively address domestic violence, no good prosecutor seeks to prosecute without the victim's testimony. *See, e.g.*, App. 78a, Letter 31 ("I had a meeting with the D.A. and it was explained to me that I did not have to testify however it would make the case much stronger if I did."); App. 35a, WCADV Statement of Interest (local prosecutors won't bring case "if the victim won't testify, even if there is strong evidence that a crime was committed"). In fact, even before *Crawford*, prosecutors all too often have considered victim participation so essential as to justify using coercive or punitive measures to ensure testimony. Gwinn & O'Dell, *supra*, at 313 (prosecutors' attempts to deal with victims who do not appear in court have "resulted in significant numbers of victims being arrested and incarcerated while their abusers have avoided jail time altogether"); *see* John Riley, *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, Nat'l L.J., Aug. 22, 1983, at 4 (battered woman who refused to testify against her husband under Anchorage, Alaska's no-drop policy was jailed overnight for her refusal to cooperate with the prosecution);[21] App. 61a, Letter 15; App. 62a, Letter 17.

Recently in Kansas, an alleged rape victim spent three nights in jail because she refused to testify against her attacker. *See Alleged Rape Victim Refuses to Testify, Spends Three Nights in Jail*, Topeka Metro News, Feb. 23, 2005, at 1. When one advocate told the state's attorney that her client

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[21] *See also* Hanna, *supra*, at 1910 ("A victim who wants to drop charges in Alexandria, Virginia must appear on the day that trial is scheduled to discuss the case with the prosecuting attorney. Victims are advised that if they do not appear, a judge may assess court costs against them.").

did not wish to testify, the prosecutor told the victim that she could be subpoenaed and if she did not show up at trial she could be arrested. *See* App. 61a, Letter 15. Another advocate reports that several counties in California issue warrants for victims who refuse to testify. *See* App. 62a, Letter 17. Victims of domestic violence in Nassau County, New York are threatened with arrest or sanctions if they are unwilling to testify. *See* App. 21a, Nassau County Coalition Against Domestic Violence Statement of Interest. There, the District Attorney issues subpoenas and warrants for their arrest if victims fail to appear, even for an interview. *See also* Robert Tharp, *supra*, at 1A. These tactics have not escaped judicial notice. *E.g.*, *Fowler v. Indiana*, 809 N.E.2d 960, 965 (Ind. Ct. App. 2004) (expressing concern with officer's threats to compel testimony and cautioning against placing victims "in the situation of being intimidated not only by the aggressor, but also by the State"), *vacated*, 829 N.E.2d 459, 462 (Ind. 2005).

Battered women, already terrorized by their abusers, should not be forced to endure additional threats or punishment from the prosecutor to whom they turn in their search for safety. A broad interpretation of "testimonial" statements that results in mandated victim participation will too often compel prosecutors to this result, leading to the re-victimization of the victims by the very system designed to protect them.

IV. A NARROW INTERPRETATION OF "TESTIMONIAL" IS CONSISTENT WITH THE FRAMERS' INTENT.

The *Crawford* Court acknowledged that a historical reading of the Confrontation Clause would preclude, at the least, admission of "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *Crawford*, 541 U.S. at 51, and modern police "interrogations." *Id.* A narrow definition of "interrogation,"

limited to the "colloquial" understanding of a coercive, formal, and structured environment, *cf.* Brief of *Amicus Curiae* National District Attorneys Association in Support of Respondents at 22-23, is fully consistent with the original intent of the Clause, and is necessary to ensure that it is not expanded in ways that will undermine its original purpose.

As explained in *Crawford*, the Framers' concern was with the unfair use of the State's power against relatively powerless defendants. *Id.* at 56 n.7 (focusing on "prosecutorial abuse"). Specifically, the Framers sought to address the State's practice of denying defendants their right to cross-examination, by enshrining that right in the Confrontation Clause. Yet in cases such as those before the Court, defendants do not actually seek to cross-examine the victims; if they did, they would be free to use their right of Compulsory Process to compel the victims' testimony. U.S. Const. amend. VI.

In these cases, the problem is not an abuse of power by the State, because the State has long *refused* to prosecute domestic violence, has only erratically treated it as a crime, and has only reluctantly come to devote significant efforts to rectifying it. Rather, the problem is a defendant who seeks to *prevent the witness from testifying* and a State that seeks to bring her to court. The absence of a live witness in this situation is not something for which the State should be penalized.

Petitioners' extremely broad reading of the Confrontation right would suppress the truth-seeking mission of the adversary process. *See Taylor*, 484 U.S. at 410-11 (neither side intended to exercise control over the other in the truth-seeking process). It would place the State's ability to prosecute a scourge that occupies a substantial portion of today's criminal justice dockets almost entirely at the whim of defendants (or the extraordinary bravery of their victims). The history and language of the Confrontation Clause support

instead a moderate application which maintains the "the closest possible fit" between the Clause and its original purpose and scope. *Cf. United States v. Patane*, 542 U.S. 630, 641 (2004) (limiting expansion of *Miranda* rule).

CONCLUSION

For the foregoing reasons, the judgments in *Davis* (05-5224) and *Hammon* (05-5705) should be AFFIRMED.

Respectfully submitted,

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APPENDIX A

INTEREST OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of the Respondents, and urge the Court to affirm the decisions of the Supreme Court of Indiana and the Supreme Court of Washington.

The **National Network to End Domestic Violence (NNEDV)** is a not-for-profit organization incorporated in the District of Columbia in 1995 (www.nnedv.org). The mission of NNEDV is to create a social, political and economic environment in which violence against women no longer exists. A network of state domestic violence coalitions, representing over 2,000 member programs nationally, NNEDV serves as the voice of battered women and their children and those who provide direct services to them. NNEDV has a long history of working at the state, local and national level to promote a strong criminal justice response to domestic violence. NNEDV works with states and local communities to implement best practices in the prosecution of domestic violence cases. NNEDV member organizations provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. NNEDV member organizations have been involved in the reform of state laws addressing domestic violence for more than two decades. Along with local, state and national leaders in domestic violence and criminal justice issues, NNEDV continues to formulate new approaches and innovative legal solutions to ending domestic violence. NNEDV was instrumental to Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000 and 2005.

The **National Network to End Domestic Violence Fund (NNEDV Fund)** is a not-for-profit organization

incorporated in the District of Columbia in 1996 for the purposes of providing technical assistance, training and public education to advocates, professionals and individuals who encountered battered women in their work and communities. NNEDV Fund has provided advice and expertise on domestic violence issues affecting battered women and their children to judges, attorneys, educators and state and local welfare, justice system personnel, and others working to end domestic violence. NNEDV Fund provides technical assistance to states as they work with police, judges and prosecutors to enforce protection orders. NNEDV Fund also collaborates with state and national domestic violence, law enforcement and other criminal justice organizations to provide training, outreach and standards for protection orders. NNEDV Fund is the leading national voice on the criminal justice response to victims of domestic violence.

The **Indiana Coalition Against Domestic Violence (ICADV)** is committed to the elimination of domestic violence through: providing public awareness and education; advocating for systemic and societal change; influencing public policy and allocation of resources; educating and strengthening coalition members; and, promoting the availability of comprehensive services.

ICADV believes that violence is endemic to our society. We believe patriarchal values and attitudes support and perpetuate violence and we seek to confront the roots of that violence within ourselves and within larger economic, social and political systems. We believe that no human being deserves to be beaten or violated by another. We believe in the right of all persons to live without fear, oppression, or sexual, emotional or physical abuse. We believe domestic violence is the use of force or threat to achieve and maintain control over others in personal relationships. *Evidence based prosecutions are critical in analyzing the legal issues absent the interpersonal relationship of the parties. If the victim*

must participate to successfully pursue criminal prosecution against the alleged batterer, then that batterer has the ability to influence the very prosecution itself. We believe batterers should be held accountable for their actions. We believe in inclusiveness and respect for diversity. Our goal is to empower individuals to achieve self-determination. We are committed to the ideas and practices of a supportive, non-competitive atmosphere in ICADV, which fosters open communications, respect and cooperation among all members of the coalition. We believe the elimination of domestic violence is best achieved by utilizing a multi-faceted approach, *including the use of evidence based prosecution.* We believe that while the majority of victims of domestic violence are women and children, everyone is affected by it and the solution involves everyone.

The **Washington State Coalition Against Domestic Violence (WSCADV)** is a non-profit organization, incorporated in the state of Washington. Founded in 1990 by domestic violence survivors, WSCADV is a statewide membership organization that organized to share resources, develop common strategies and strengthen community responses to domestic violence in Washington State. WSCADV's core commitment of the WSCADV is to support domestic violence survivors, and emergency shelter and advocacy programs by advocating for laws and public policies that promote safety and justice for domestic violence victims.

WSCADV conducts statewide trainings for law enforcement officers and prosecutors about domestic violence and the needs of victims, and assists local communities to implement best practices in the investigation and prosecution of domestic violence cases.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative

public policy. Legal Momentum is dedicated to working to end violence against women. Legal Momentum was one of the lead advocates for the landmark Violence Against Women Act and its reauthorizations, which seek to redress the historical inadequacy of the justice system's response to domestic violence. Legal Momentum also represents victims of domestic violence who suffer housing and employment discrimination related to the violence. Legal Momentum is concerned that adoption of a broad definition of "testimonial" would foreclose the possibility of evidence-based prosecution and thus ensure that violent criminals go unpunished and victims are without protection of the law.

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** is a national non-profit organization dedicated to filling a vacuum in legal advocacy for battered women and children by providing expert *pro bono* representation in domestic violence appeals. DV LEAP is a partnership of the National Network to End Domestic Violence, George Washington University Law School, and a network of participating law firms, and is directed by one of the nation's leading domestic violence advocates.

The **Alabama Coalition Against Domestic Violence (ACADV)** is a nongovernmental, nonprofit organization that speaks on behalf of all Alabama domestic violence shelters and has been a leader in education, policy reform and advocacy. ACADV also operates a 24-hour statewide hotline for domestic violence. ACADV has a long history of collaboration at the state and local level. Staff and member programs work in partnership with the Alabama Legislature to pass laws that protect victims of domestic violence and hold perpetrators accountable. ACADV provides training and technical assistance to thousands of professionals around the state to promote an effective criminal justice response to domestic violence.

The **Arizona Coalition Against Domestic Violence (AzCADV)** is a not-for-profit organization incorporated in 1980 (azcadv.org). The mission of AzCADV is to lead, to advocate, to educate, to collaborate, to end domestic violence in Arizona. AzCADV is a coalition of 129 members who are domestic violence service providers, individuals, students, task forces and survivors. As a long term advocate for domestic violence victims in Arizona, the Coalition collaborates with state, local and national efforts to promote a strong criminal justice response to domestic violence. AzCADV works with states and local communities to implement best practices in the prosecution of domestic violence cases. The Coalition also works with the Arizona Peace Officer Standards and Training Board to provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. AzCADV and its member organizations have been involved in the reform of state laws addressing domestic violence for more than two decades. Along with local, state and national leaders in domestic violence and criminal justice issues, AzCADV continues to formulate new approaches and innovative legal solutions to ending domestic violence. AzCADV and its members were instrumental to Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000 and 2005.

The mission of **Break the Cycle** is to engage, educate and empower youth to build lives and communities free from dating and domestic violence. Founded in 1996, Break the Cycle is the nation's first organization to provide law-based domestic violence services exclusively to young people, ages 12 to 24. Our domestic violence prevention and early intervention services include education and outreach, peer leadership opportunities and comprehensive, free legal services for young victims of abuse. Break the Cycle works on both a national and local level to provide youth with resources they need to end domestic violence. Since our

inception, Break the Cycle has directly served more than 65,000 youth across the nation.

Our 10 years of experience working with abused youth throughout the country guide our support of this brief. Girls and women between the ages of 16 and 24 are the most vulnerable to domestic violence, experiencing the highest per capita rates of non-fatal intimate partner violence. According to these statistics, Break the Cycle deals with the most threatened or all female domestic violence victims. For this reason, we are in a unique position to understand the significant importance of evidence-based prosecution in domestic violence cases.

There are several obstacles unique to the 12 to 24 age group that greatly increases the difficulty of seeking prosecution in domestic violence cases. On occasion, there are situations where abusers victimize our clients sexually and physically. Often there are children born into these relationships and it may not be in the victim's best interest to prosecute the case. If the client is a woman, she may be in danger from the abuser and/or his friends and his family. A number of our clients have abusers who are even gang members and the client's safety is greatly threatened by testifying against the abuser. If prosecution could go forward without the victim being involved, it would decrease the pressure on victims to testify and would assist prosecutors with cases that they might otherwise not be able to prosecute.

The **California Partnership to End Domestic Violence (CPEDV)** is the federally recognized statewide domestic violence coalition for California. Its members include approximately one hundred domestic violence service organizations, supportive organizations, survivors of domestic violence, and other concerned individuals. CPEDV works to end domestic violence through public education, partner-

ships, advocacy, public policy, and direct services and is member driven.

CPEDV was formed in 2005 out of a merger of two former entities, the California Alliance Against Domestic Violence (CAADV) and the Statewide California Coalition for Battered Women (SCCBW). CAADV has filed several amicus briefs with the California Supreme Court. These included a brief filed in *People v. Cornell Brown*, 33 Cal.4th 892 (Cal. 2004), in which the issue on appeal was the admissibility of expert witness testimony where the alleged victim of domestic violence partially recanted at trial.

In December 2005, CPEDV filed an amicus brief in *People v. Giles*, to be heard in the California Supreme Court in 2006. This case deals with the admissibility of a statement by a victim of a domestic violence homicide made to police on a previous occasion and implicating the defendant. The defendant argued on appeal that the admission of this statement violated his Sixth Amendment right to confrontation. However, the appellate court ruled that it was admissible under the rule of forfeiture, which Justice Scalia stated in Crawford is an exception to the right of confrontation. CPEDV's brief emphasized the deleterious effect on domestic violence prosecutions which would ensue if courts were not allowed to admit such statements when victims are not available to testify, through intimidation or death.

The **Colorado Coalition Against Domestic Violence (CCADV)** is a statewide membership organization. CCADV was established in 1978 by twelve domestic violence service providers in order to provide a strong statewide voice for survivors of domestic violence, their families, and providers of service. As the statewide voice for survivors, CCADV represents over 80 domestic violence shelters, resource centers, allied organizations and individuals. Through commu-

nity education, networking and the empowerment of battered women and children, CCADV provides a system of comprehensive services that support member programs' ability to effectively serve diverse survivors of domestic violence (over 40,000 individuals each year). One of the central goals of CCADV is to enhance criminal justice response to domestic violence in Colorado. Recognizing that many victims of domestic violence do not access the criminal justice system for fear of retaliation, CCADV supports practices that facilitate offender accountability while maintaining victim safety. Since domestic violence victims are most vulnerable to an assault when they attempt to leave or sever the relationship with the defendant, victims may refuse to testify in court against their abusers. In these instances, CCADV recognizes the importance of evidence-based prosecution to ensure that offenders can be held accountable even without a domestic violence victim's in-court testimony.

CORA (Community Overcoming Relationship Abuse) is a nonprofit organization directed at ending domestic violence/abuse in San Mateo County, California (www.corasupport.org). CORA provides free and confidential services to victims and survivors of domestic/dating violence and abuse. Our services include a 24-hour hotline, support groups, legal services, emergency and transitional housing, and more, in English, Spanish and Tagalog. CORA is a multicultural agency committed to serving victims/survivors of domestic violence/abuse, regardless of age, ethnicity/race, financial status, language, sexual orientation, immigration status, class, religion, gender, mental or physical ability..

The **Connecticut Coalition Against Domestic Violence, Inc. (CCADV)** was founded in 1978 as the "Battered Women's Task Force" and incorporated in 1986, as a vehicle for community-based domestic violence shelter programs to provide statewide public policy advocacy,

legislative reform, and education on the issue of domestic violence. CCADV is a membership organization whose purpose is to work together to end domestic violence by changing the social conditions, beliefs and social actions that perpetuate abuse against women and children. There are eighteen domestic violence shelter programs in Connecticut and all are members in good standing of CCADV. Over the years as the needs of battered women and their children have changed, the eighteen domestic violence shelter programs have expanded the types of advocacy and services offered to meet these changing needs. The Coalition's focus is to provide training, education and technical assistance to its member programs in order to ensure quality and consistent services throughout the State of Connecticut.

CCADV was a member of the 1986 Governor's Task Force on Family Violence and the 1997 Task Force to Study the Issue of Domestic Violence, which was created pursuant to Public Act 96-245. In 1986, CCADV successfully worked to ensure passage of Connecticut's Family Violence Prevention and Response Act (FVPRA), still considered one of the most comprehensive family violence statutes in the country.

The **Delaware Coalition Against Domestic Violence** is a statewide non profit organization, incorporated in the State of Delaware in 1994 (www.dcadv.org), comprised of domestic violence agencies, allied organizations and supportive individuals. The mission of DCADV is to eliminate domestic violence through: acting as an educational and informational resource to our member agencies and the community; advocating for domestic violence concerns in Delaware and providing a strong, unified statewide voice for victims of domestic violence and their children, domestic violence programs, and victim service providers.

For the past twelve years, DCADV has worked at both the state and local levels to help ensure that the policies and practices of Delaware's civil and criminal justice systems serve the interests of battered women and their children. Through our work with domestic violence shelter and advocacy programs, and our Survivors Task Force, we serve as a voice for both survivors of domestic violence and the programs that serve them. DCADV provides training and technical support to the Delaware Department of Justice as well as local and state law enforcement agencies and participates on numerous committees and task forces that identify and, hopefully resolve problems within our social and legal institutions. Much work has been done to encourage prosecutors and law enforcement officers in our state to take domestic violence seriously and to respect the rights of battered women who may be afraid to testify against their abusers and to carefully collect evidence that will enable the Court to prosecute domestic violence cases, even if the victim is not able to participate. These efforts are informed by both research on best practices and the knowledge and expertise of other state coalition and national organizations such as the National Network to End Domestic Violence. DCADV is also actively involved in reforming state and local laws to better address the needs and protect the rights of battered women who live and/or work in Delaware. Moreover, DCADV continues to work in partnership with state and national leaders to help formulate new approaches and innovative legal solutions to ending domestic violence.

The **District of Columbia Coalition Against Domestic Violence (DCCADV)** is a not-for-profit organization incorporated in the District of Columbia in 1986 (www.dccadv.org). The mission of the DCCADV is two-fold: 1) to eradicate all types of relationship violence including: domestic violence, spousal rape, sexual assault, stalking, mental and emotional abuse, and acquaintance rape through the coordinated mobilization of efforts to effect systemic

social change; and 2) to build a city wide response in the District and surrounding jurisdictions in partnership with the community, providers, and concerned others to more effectively ensure the safety, security, and justice needs of those living with violence and abuse. DCCADV pursues these goals through its focus on advocacy, public education, public policy, technical assistance and training, resources, research and direct services. The DCCADV serves as the voice of battered women and their children and those who provide direct services to them. DCCADV has a long history of working at state and local levels to promote a strong criminal justice response to domestic violence. DCCADV works with the community to implement best practices in the prosecution of domestic violence cases. DCCADV provides training for law enforcement officers and prosecutors about domestic violence and the needs of victims. DCCADV has been involved in the reform of local laws addressing domestic violence for more than a decade. Along with governmental agencies and not for profit direct service providers in domestic violence and criminal justice issues, DCCADV continues to formulate new approaches and innovative legal solutions to ending domestic violence.

Therefore, DCCADV understands and advocates for evidence-based prosecution in domestic violence cases and is committed to joining the amicus brief(s) prepared by the National Network to End Domestic Violence addressing this issue.

The **Florida Coalition Against Domestic Violence (FCADV)** is the statewide nonprofit advocacy and public policy organization for Florida's 41 certified domestic violence centers which provide shelter and other services to domestic violence, dating violence, sexual violence and stalking victims in Florida's 67 counties. In 1977, 14 shelters in Florida formed a network of battered women's advocates known as the Refuge Information Network. Several years

later this organization was incorporated as FCADV. This organization was founded on principles of cooperation and unity among shelters. FCADV's mission is to create a violence-free world by empowering women and children through the elimination of personal and institutional violence and oppression against all people. FCADV provides leadership, advocacy, education, training, technical assistance, public policy and development, and support to domestic violence center programs.

The **Georgetown University Law Center Domestic Violence Clinic** is a clinical legal education program in which law students have represented victims of domestic violence in civil protection order cases since 1983. Each year, the Clinic provides legal representation to approximately 60 clients in the D.C. Superior Court, and provides legal counseling to another 100 local victims of family abuse. In addition, until September, 2000, the Clinic administered the Emergency Domestic Relations Project, which provided a wide range of legal services to more than 50,000 low-income, unrepresented victims of domestic violence over the past 21 years. Project personnel train local attorneys in domestic violence law, refer indigent victims to them for pro bono representation, and mentor them through their first cases.

The **Georgia Coalition Against Domestic Violence** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The mission of the Georgia Coalition Against Domestic Violence (GCADV) is to support its member programs to achieve safety and justice for domestic violence victims. GCADV is a coalition of domestic violence programs from around the state of Georgia. GCADV has extensive expertise on the physical, emotional and economic dangers domestic violence victims and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors,

and the media in providing a more effective net of protection for battered women. We provide training and technical assistance to our member programs, the police, courts and legislators.

We have seen first-hand the effects of low prosecution rates on the escalation of battering behavior. We have worked with many victims who are unable to follow through with the extensive and prohibitive prosecution process due to safety concerns, interference with job security (which impacts economic stability), and the emotional trauma of prosecuting their current or former partners. Yet we are clear that prosecuting batterers is currently the only control the system has to deescalate a batterer's violence. Without evidence based prosecution, many batterers will continue their violence with current and/or future partners.

Hawaii State Coalition Against Domestic Violence (HSCADV), a private, not-for-profit, statewide coalition, was formed in 1980. It is comprised of the majority of the directors of the spouse abuse shelters and counseling programs for victims and perpetrators of partner abuse on each of the islands, as well as the Victim Witness Assistance Division of the Honolulu Prosecutor's Office, the Domestic Violence Clearinghouse and Legal Hotline, the Legal Aid Society of Hawaii, and Na Loio Immigrant Rights and Legal Center. The HSCADV currently has twenty-five agency/ program members.

The HSCADV conducts activities to promote domestic violence intervention and prevention and to increase public awareness of domestic violence issues. The purpose of the Coalition is to coordinate efforts to end family violence in Hawaii. The HSCADV provides: coordination of services, community education and training on family violence, planning and technical assistance on family violence matters to domestic violence programs and agencies, and facilitation

upon request. The HSCADV also collects resource materials and serves as a clearinghouse for domestic violence information and resource materials. The HSCADV collaborates with other coalitions, groups and individuals from both the private and public sectors on a variety of projects.

The **Idaho Coalition Against Sexual & Domestic Violence** is a not-for-profit organization incorporated in Idaho in 1980. The mission of the Idaho Coalition Against Sexual & Domestic Violence is to provide education, assistance, and support to individuals, programs, and organizations dedicated to ending sexual assault and domestic violence. A network of state domestic violence and sexual assault victim services programs, law enforcement, prosecutors, and other service providers, the Idaho Coalition serves as the statewide voice of victims of sexual assault, dating violence, domestic violence and stalking. Victims of domestic violence in Idaho who testify against the alleged abuser in criminal court are subject to increased danger, coercion, and trauma. Victimless prosecutions have taken place in order to protect the safety of the victims. Curtailing victimless prosecutions would endanger Idaho's ability to prosecute domestic violence, thereby further endangering a population already greatly at risk.

The **Illinois Coalition Against Domestic Violence (ICADV)** is a non-profit organization, incorporated in the State of Illinois. Founded in 1978, ICADV is a statewide membership organization of local domestic violence programs and individuals committed to ending domestic violence. The mission of the ICADV is to eliminate domestic violence by changing societal attitudes, practices and policies about women from diverse groups, their children and violence through education, advocacy and social action. To that end member programs provides services annually to over 50,000 adults and children.

The ICADV is the only statewide organization in Illinois that provides training and technical assistance on domestic violence issues for battered women's advocates, other professionals and community lay people. ICADV actively promotes public policy to protect victims of domestic violence and their children and to hold perpetrators accountable for their violent behavior. ICADV participates actively in training law enforcement officers, probation officers, prosecutors, lawyers and the judiciary on Illinois statutes and federal statutes regarding violence against women and children. ICADV encourages prosecution of domestic assaults as a means to decrease domestic violence homicides. However, prosecution is difficult because victims are afraid of the perpetrators and perpetrators commonly threaten the victim with retaliation for any cooperation they give to the court. ICADV promotes collection of evidence and prosecution wherever possible using witnesses other than the victim.

The **Iowa Coalition Against Domestic Violence (ICADV)** is a non-profit organization, incorporated in the state of Iowa in 1985. ICADV provides educational and technical assistance to the domestic violence programs across Iowa, and also acts on a statewide and national level to promote public policy and legislative issues on behalf of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women through support to programs providing safety and services to battered women and their children. ICADV recognizes that unequal power contributes to violence against women. Therefore, ICADV advocates social change, legal and judicial reform, and the end to all oppression.

Jane Doe Inc. (JDI) is the Massachusetts Coalition Against Sexual Assault and Domestic Violence. JDI is a statewide membership organization of over 60 domestic violence programs and rape crisis centers. The mission of

JDI is to bring together organizations and people committed to ending domestic violence and sexual assault. We advocate for responsive public policy, raise awareness, and provide technical assistance and support to our member organizations who provide comprehensive prevention and intervention services. In keeping with its mission, JDI has an interest in removing barriers that limit or deny a domestic violence survivor's access to justice and support services. Over the last twenty-eight years we have worked with police and prosecutors to use reliable hearsay exceptions as a best practice in the prosecution of domestic violence cases. This practice has resulted in a substantial increase in the numbers of victims and their children who were further protected from harm.

The **Kansas Coalition Against Sexual and Domestic Violence (KCSDV)** is a non-profit organization representing domestic violence and sexual assault programs and individual battered and formerly battered women and victims of sexual violence. KCSDV has extensive expertise on the physical, emotional and economic dangers women and their families face when they challenge their batterers and perpetrators in a court of law. This organization and its member programs work closely with courts, legislators, law enforcement agencies, prosecutors, and the media across the state to provide a more effective network that will protect battered women and sexual assault victims seeking help through a court proceeding.

The **Kentucky Domestic Violence Association (KDVA)** is a non-profit organization that provides training, technical assistance and support services to Kentucky's sixteen domestic violence shelter programs. These programs help thousands of victims of domestic violence and their children each year through shelter, education, counseling, casework and advocacy. The mission of KDVA is to ensure that the right to live free of any form of domestic abuse is

valued, protected and defended in the Commonwealth of Kentucky. Given the real complexities victims of domestic violence must face while attempting to survive and/or exit a domestic violence relationship, and given the critical need for perpetrators of domestic violence to be held accountable for their actions, KDVA recognizes the importance of evidence-based prosecutions in domestic violence cases.

The **Legal Aid Society of Northwest North Carolina, Inc. (LAS)** is a not-for-profit organization incorporated in North Carolina. We were incorporated in 1962 and are the oldest civil legal services agency in North Carolina. The mission of LAS is to provide equal access to the civil justice system for low income people in our six county service area. In 1996, in collaboration with many community partners, the Legal Aid Society began our Domestic Violence Advocacy Center to improve the representation of victims of domestic violence in civil protective order hearings in Forsyth County. In 2002 we expanded DVAC to provide services to all six counties in our service area including Forsyth, Surry, Stoke, Davie Yadkin and Iredell Counties. As a part of our work to end domestic violence in the lives of our clients, and in our community we work very closely with our community collaborative which includes representatives from our district attorney's Office, sheriff's department, police departments, Family Services, Inc. health care providers, our local Department of Social Services among others. We also work with statewide collaborative to improve the social and legal responses to domestic violence in our state.

The **Maine Coalition to End Domestic Violence (MCEDV)** is a not-for-profit organization incorporated in the state of Maine in 1977 (www.mcedv.org). The mission of MCEDV is to create a social, political and economic environment in which violence against women no longer exists. A coalition of the nine Maine domestic violence

organizations, MCEDV serves as the statewide voice of battered women and their children and those who provide direct services to them. MCEDV has a long history of working at the state and local level to promote a strong criminal justice response to domestic violence. MCEDV works with state agencies and local communities to implement best practices in the prosecution of domestic violence cases. MCEDV and its member organizations provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. MCEDV and its member organizations have been involved in the reform of state laws addressing domestic violence for more than two decades. Along with local, state and national leaders in domestic violence and criminal justice issues, MCEDV continues to formulate new approaches and innovative legal solutions to ending domestic violence.

The **Maryland Network Against Domestic Violence (MNADV)** has been working since 1980 to eliminate domestic violence in Maryland through *education, training, and advocacy.* As Maryland's state coalition, the Network works together with local domestic violence programs as well as criminal justice and law enforcement personnel, legal advocates, health care and social service providers, clergy, educators, businesses, community groups, and concerned individuals to *promote a coordinated community response to end domestic violence.* MNADV provides a statewide helpline, website, numerous publications; offers professional training and information to a broad range of service providers on a variety of topics through conferences and specialized workshops; develops model policies, protocols, and standards; provides legislative, public policy and systems advocacy; collaborates with local, state, and national organizations; sponsors an annual awards dinner, Memorial Service, and public education activities.

The **Michigan Coalition Against Domestic and Sexual Violence (MCADSV)** is a not-for-profit organization incorporated in the State of Michigan for the purpose of providing services and advocacy on behalf of the victims of sexual assault and domestic violence and their minor children. MCADSV is a membership organization of over 50 domestic violence and sexual assault service provider agencies, as well as other supportive agencies and individuals, committed to ending domestic and sexual violence. For over twenty-five years, MCADSV has provided training, technical assistance and policy consultation to victim services programs, the bar, the courts, law enforcement agencies, governmental bodies and others on the issue of domestic violence and sexual assault.

The **Minnesota Coalition for Battered Women, Inc. (MCBW)** is a private, non-profit membership organization which serves as a statewide coalition with approximately one hundred local, regional and statewide grassroots organizations which provide shelter and services to battered women and their families. MCBW provides training and technical assistance for member programs, networking and support for battered women and community education to law enforcement, schools and the general public. The member organizations of MCBW, with consultation and assistance provided by the Coalition, provide shelter and lay advocacy every year to thousands of battered women. MCBW, both directly and in collaboration with member programs, works with law enforcement and prosecutors to provide safety for battered women and their children.

Missouri Coalition Against Domestic Violence (MCADV), is a non-profit membership organization, incorporated in 1980, of 91 Missouri programs that provide services to those who have been victimized by domestic violence. MCADV has extensive expertise addressing the physical, emotional, and economic dangers survivors and

their families experience in courts of law when seeking safety and protection, as well as accountability, from their abusers. MCADV works closely with courts, legislators, law enforcement, prosecuting attorneys, and a wide variety of community service programs and institutions to provide education, public policy, and adequate and reasonable procedures to achieve effective protections for abused people.

MCADV is extremely concerned about the case of *Hammon* v. *Indiana* because the Court's decision will have significant implications for cases involving domestic and sexual violence in Missouri and throughout the nation. Victims of domestic and sexual violence may have legitimate concerns regarding their safety that preclude them from testifying in criminal cases brought to trial. Thus, the use of evidence-based prosecution, including the presentation of reliable hearsay, is necessary to hold the assailants accountable for their criminal behavior. A key component of evidence-based prosecution includes the ability to present statements made as excited utterances. This exception to the hearsay rule has long been recognized by the courts as a reliable form of evidence. A statement made contemporaneously with, or immediately after, a startling event provides a high degree of reliability. When jurors do not receive sufficient information about the case, juries may not hold the perpetrators accountable for their crimes. The elimination of the use of reliable hearsay evidence would result in tragic miscarriages of justice.

The **Montana Coalition Against Domestic and Sexual Violence (Montana Coalition)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Montana Coaliton has extensive experience on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law.

The **Nassau County Coalition Against Domestic Violence** in Nassau County, New York, provides comprehensive services that focus on the safety and well being of victims of domestic violence, and sexual assault. We also work to ensure societal accountability, improve institutional responsiveness to victims, and increase public awareness in order to prevent domestic violence, and sexual assault. Victims of domestic violence in Nassau County, New York were being threatened with arrest or sanctions if they indicated that they were unwilling to testify against their abuser. The DA's office often penalized them for their unwillingness to testify by issuing subpoenas and warrants for their arrest if they failed to appear, even for an interview with the Assistant District Attorney. When these victims were clients of our agency, we would intervene with the DA's office on their behalf, but regretfully, all too often the victim (even our clients) did not realize that we were a resource to intercede on their behalf.

The **Nebraska Domestic Violence Sexual Assault Coalition (NDVSAC)** is a non-profit statewide organization representing Nebraska's 22 domestic violence programs and individual battered and formerly battered women.

NDVSAC has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the civil and criminal justice systems, and the media in providing a more effective net of protection for battered women who ask for help. NDVSAC works with state and local prosecutors to promote a strong criminal justice response to domestic violence and to implement best practices in the prosecution of domestic violence cases, particularly when battered women are unable to take the stand to testify against abusers. NDVSAC and its member organizations provide training for

law enforcement officers and prosecutors about domestic violence and the needs of victims.

The **Nevada Network Against Domestic Violence (NNADV)** is a not-for-profit organization founded in 1980, and incorporated in the State of Nevada, to help Nevada's communities respond creatively and effectively to the needs of victims of domestic violence (www.nnadv.org). As a statewide organization, NNADV provides a resource library and technical assistance to communities and advocates. NNADV coordinates quarterly network meetings, assists in the provision of rural community education, and is active in educating legislators on issues of concern to Nevada families. In an effort to promote social change and empower women and all persons affected by domestic violence, NNADV is an inclusive network which supports member programs, communities and individuals to work on the elimination of domestic violence and the core issues of societal oppression. NNADV has a long history of working at state and local levels to promote a strong criminal justice response to domestic violence. NNADV has been working with local communities to implement best practices in the prosecution of domestic violence cases. We know, through testimony to the Nevada State Legislature, that prosecutors rely to a very great extent on the existence of 911 tapes or excited utterances when they decide whether to move forward with a domestic violence prosecution. If these types of evidence become inadmissible in court because they are "testimonial," NNADV believes that this would have detrimental impact on the prosecution of domestic violence cases in Nevada.

The **New Hampshire Coalition Against Domestic and Sexual Violence ("Coalition")** is a statewide network of fourteen independent member programs committed to ending domestic and sexual violence. Founded in 1977, the Coalition continues to ensure that high-quality services are provided to victims/survivors of domestic violence, sexual

abuse and stalking. Because the Coalition recognizes that violence and oppression are connected, we promote social change by empowering victims and by holding systems accountable for their responses to domestic and sexual violence and stalking.

Our member programs have a great deal of experience providing services to victims who cannot or choose not to testify against their abusers. The victim's reluctance stems from numerous factors including: legitimate fear of retribution, ambiguous feelings about pursuing criminal charges against their partner, and lack of information about alternative economic assistance to replace financial support from their partners. We believe that accountability for abusive partners is key to ending family violence. Therefore, NHCADSV supports evidence based prosecution and asks to have our comments added to the record.

The **New Jersey Coalition for Battered Women (NJCBW)** is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, NJCBW is a private, non-profit corporation whose members include 29 domestic violence programs in New Jersey. NJCBW advocates for battered women with state level governmental and private agencies, the state legislature, judiciary and governor to support legislation and policies that will increase the safety and options of victims of domestic violence. It also provides information, resources, technical assistance and training to domestic violence programs, the public and those agencies, organizations and individuals involved with New Jersey's response to domestic violence.

NJCBW acknowledges the critical importance of evidenced based prosecution in domestic violence cases. NJCBW has many years of experience dealing with domestic violence victims who are reluctant or unable to testify in a

legal matter. The concept of evidence based prosecution grew out of the need to hold batterers accountable without a domestic violence victim's testimony or cooperation and sends a strong message that domestic violence is a serious crime against society.

The **New Mexico Coalition Against Domestic Violence (NMCADV)** is a non-profit organization representing domestic violence programs and individually battered and formerly battered women. NMCADV has expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law.

The **New York State Coalition Against Domestic Violence (Coalition)** is a not-for-profit membership organization whose mission is to eradicate domestic violence and to ensure the provision of effective and appropriate services to victims of domestic violence through community outreach, education, training, technical assistance and policy development. The Coalition's principles and practices prioritize the safety and concerns of women who are abused, provide support and encouragement for the participation of women who are abused in the struggle to eradicate personal and institutional violence against them, and provide for a non-competitive atmosphere that fosters open communication, respect and cooperation among advocates and women who are abused. The Coalition submits this Statement of Interest because we believe in the importance of evidence-based prosecution in domestic violence cases.

The **North Carolina Coalition Against Domestic Violence (NCCADV)** is a statewide non-profit membership organization providing support services to local domestic violence agencies and allied professionals. The mission of NCCADV is to create social change through the elimination of the institutional, cultural, and individual oppressions that contribute to domestic violence. Approximately ninety

domestic violence programs provide direct services to victims of domestic violence in all 100 counties in NC. Domestic violence crisis lines in NC received over 94,000 calls in FY 2003, and local domestic violence programs served over 45,000 victims in FY 2003. In addition, from January 1, 2002, through December 31, 2005, 295 women, children, and men have been murdered in NC as a result of domestic violence, according to information collected by our Coalition. North Carolina ranks 16th in the nation for the number of per capita homicides committed by men against women in 2003, according to the Violence Policy Center study released in September 2005. NCCADV works closely with allied professionals within the criminal justice system to enhance accountability of abusers and increase safety for victims. We provide training to law enforcement, prosecutors, magistrates, clerks and other court personnel on a statewide and local level. We are very concerned about the impact that the Court's decision in *Crawford* has had on the successful prosecution of domestic violence cases in our state. If perpetrators of domestic violence are not held accountable for their crimes, domestic violence will continue to be an epidemic in our state, and women, children, and men will continue to be murdered as a result.

The **North Dakota Council on Abused Women's Services/Coalition Against Sexual Assault in North Dakota (NDCAWS/CASAND)** is a not-for-profit organization incorporated in North Dakota since 1980. The mission of NDCAWS/CASAND is to provide leadership by facilitating local, state, and regional collaboration in the identification and prevention of domestic and sexual assault. As a network of community based domestic violence providers, NDCAWS/CASAND serves as the voice of battered women and their children and those who provide direct services to them in North Dakota. NDCAWS/CASAND has a long history of working at the state and local level to promote strong criminal justice response to domestic

violence. NDCAWS/CASAND works with providers in all 53 North Dakota counties to implement best practices in prosecution of domestic violence cases. We provide training for law enforcement officers, judges and prosecutors about domestic violence and the needs of victims. Our member organizations have been involved in helping to craft state laws addressing domestic violence since 1980. Our organization continues to work on new approaches and innovative legal solutions to ending domestic violence and sexual assault in North Dakota.

The **Ohio Domestic Violence Network (ODVN)** is a not-for-profit membership organization incorporated in the state of Ohio and is comprised of 78 domestic violence programs and 213 allied professionals representing batterers' intervention programs and other legal and social service agencies that provide services and advocacy to victims and perpetrators of domestic violence. The member agencies represent all regions of the state, including rural and urban areas. ODVN advances the principle that all people have the right to an oppression and violence free life; fosters changes in our economic, social and political system and brings leadership, expertise and best practices to community programs. ODVN seeks individual, legislative and social change, produces and shares information, and educates the public and other agencies about domestic violence and resource options. As Ohio's largest and most comprehensive resource on domestic violence, ODVN represents the interests of and works arm in arm with domestic violence agencies and victims throughout Ohio. ODVN is a member of the National Network to End Domestic Violence.

ODVN works closely with state agencies and local communities to implement best practices in the prosecution of domestic violence cases. ODVN recently revised the Ohio Model Protocol for Responding to Domestic Violence. The Model Protocol encourages prosecutors to develop procedures to evaluate domestic violence cases from a perspective

that is victim sensitive without being victim driven. Prosecutors are also encouraged to prosecute without the availability of the victim by using evidence gathered at the scene, police reports, medical and other witnesses. ODVN also provides training for law enforcement officers, prosecutors and court personnel on the dynamics of domestic violence. ODVN and its members have been involved in the reform of state laws including enactment of the preferred arrest law in 1994 and statutory bail consideration for alleged domestic violence offenders in 2005. ODVN will continue to work towards the development of strategies designed to prevent domestic violence.

The **Oklahoma Coalition Against Domestic Violence and Sexual Assault (OCADVSA)** is a not-for-profit organization incorporated in the state of Oklahoma in 1981. The purposes of OCADVSA are the elimination of domestic and sexual violence in Oklahoma; to ensure the safety of victims of domestic and sexual violence and stalking; and to hold perpetrators of the crimes of domestic violence, sexual assault and stalking accountable for their crimes. This is accomplished by creating a social and political atmosphere in which these crimes will no longer occur.

OCADVSA is the membership organization of domestic violence and sexual assault service providers that includes twenty-eight state certified and tribal victim service organizations. OCADVSA has a long and successful history of working at the state, local and national levels to promote a strong criminal justice response to domestic violence and sexual assault. OCADVSA works with allied state and local level agencies and organizations to implement the best practices in the prosecution of domestic violence and sexual assault cases. OCADVSA provides training and education for law enforcement, prosecutors and the judiciary about domestic violence and sexual assault and the needs of victims. OCADVSA has consistently been involved in the

reform of state and national laws addressing the crimes of domestic and sexual violence. OCADVSA worked with national leaders such as the National Network to End Domestic Violence and the National Coalition Against Domestic Violence in the enactment and implementation of the Violence Against Women Acts of 1994, 2000 and 2005.

For five years OCADVSA has collaborated with the Oklahoma Attorney General, the Oklahoma District Attorneys Council, the Oklahoma Regional Policing Institute and the Spirits of Hope Native American Coalition to host the Annual Violence Against Women Conference and the annual regional trainings in 4 sites across the state to address the importance and techniques of evidence based prosecution.

The **Oregon Coalition Against Domestic and Sexual Violence (OCADSV)** is a not-for-profit organization incorporated in the state of Oregon in 1978. Our mission is to support organizations that assist victims of domestic and sexual violence; provide training assistance to staff and organizations engaged in crisis intervention, shelter, and public education of domestic and sexual violence; explore and support innovative approaches to prevention of and responses to domestic and sexual violence; and to change societal conditions that cause domestic and sexual violence to exist. OCADSV is also involved in promoting legislation designed to protect and to empower women survivors of domestic and sexual violence and to develop public policy that ensures an effective statewide system to address and respond to violence against women. Our staff is active on many state and governmental committees and councils confronting the issue of domestic violence and sexual assault including the Governor's Council on Domestic Violence, STOP Violence Against Women Advisory Board, Oregon Department of Human Services: Children, Adults and Families, and the State Family Law Advisory Committee—domestic violence subcommittee.

The **Pennsylvania Coalition Against Domestic Violence, Inc. (PCADV)** is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of proving services and advocacy on behalf of victims of domestic violence and their minor children. PCADV is a membership organization of 62 shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth. For thirty years, PCADV has provided training and technical assistance to domestic violence programs, attorneys, the courts, and law enforcement agencies on issues of domestic violence.

PCADV is deeply concerned about the safety of victims of domestic violence and knows that battering is extremely dangerous and can be lethal. At the same time, it can also be lethal for a victim to testify against the perpetrator of the violence. The evolution and success of the victimless prosecution model has protected many victims, who cannot or will not testify, from the inherent dangers of participating in the criminal prosecution of the offender. It provides a highly effective means of prosecution that holds the offender accountable and protects the victim from further danger, coercion and trauma.

PCADV joins in the brief of amicus curiae to assist the Court in its consideration of the scope of the *Crawford* decision and the ability of prosecutors to introduce victims' statements at trial by finding they are non-testimonial, admissible evidence.

The **Rhode Island Coalition Against Domestic Violence ("Coalition")** is a not-for-profit organization incorporated in the State of Rhode Island in 1979 to assist and support Rhode Island's six shelter programs for victims of domestic abuse. The Coalition has taken the lead in policy and program development on behalf of battered women for

the past twenty-one years. The Coalition has been active in implementing the provisions of the Violence Against Women Act in Rhode Island, and in national advocacy activities relating to the Act. The Coalition serves as a resource for the six member agencies, providing training, technical assistance, statewide planning and needs assessment research, and dissemination of resources. As an organization dedicated to safety and justice for domestic violence victims, we know that evidence-based prosecution is critical to an effective criminal justice response to domestic violence.

The **South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA)** is a not-for-profit organization incorporated in the state of South Carolina in 1981. The mission of SCCADVASA is to lead the state in its efforts to prevent and eradicate interpersonal violence. SCCADVASA represents the 23 non-profit organizations throughout South Carolina offering a myriad of services to victims of domestic and sexual violence in both federal and state legislative efforts. In addition, for the last 25 years, SCCADVASA has been instrumental in setting standards of service for all its member organizations and has established collaborative efforts with state agencies, other non-profit organizations and business and industry leaders to educate and inform the general public in regard to the issues of domestic violence and sexual assault and to engage the entire state in efforts to prevent and respond to these crimes. Along with these partners, SCCADVASA continues to formulate new approaches and innovative legal solutions to ending domestic and sexual violence and to ensuring a high quality of services to victims of both domestic and sexual violence.

Stop Family Violence (SFV), a national grassroots activist organization founded in 2000, is a project of the Tides Center, a not-for-profit organization incorporated in 1995 in San Francisco, CA. Stop Family Violence's mission is to organize and amplify our nation's collective voice to end

family violence. Our 30,000 members are victims/survivors of domestic violence, sexual assault, stalking, child abuse, child sexual abuse, and elder abuse as well as service providers, allied professionals and concerned members of the general public. Stop Family Violence invites its members to take action at the local, state and national level to effect policy change that will ensure safety, justice, accountability and healing for victims of all forms of family violence.

The **Tennessee Coalition Against Domestic and Sexual Violence (TCADSV)** is a non-profit organization composed of diverse community leaders and program members who share a common vision of ending violence against women and children through public policy advocacy, education, and activities which increase the capacity of programs and communities to address violence. Our services include: technical assistance, training, curriculum and resource development, public policy advocacy, newsletter publication, networking opportunities, resource library, speaker's bureau and a toll-free information line. As a statewide coalition, we serve domestic violence and sexual assault programs, community groups and organizations, criminal justice agencies, victim service agencies, allied professionals and individuals seeking information and resources.

The **Utah Domestic Violence Council (UDVC)** is a not-for-profit organization incorporated in Utah in 1998. The mission of UDVC is to lead a collaborative, statewide effort to eliminate domestic violence. UDVC consists of 36 voting members from across the state who represent licensed domestic violence shelters, victim advocate programs, law enforcement, Utah Office of the Attorney General, Utah Division of Child and Family Services, Utah Prosecution Council, Utah Legal Services, Utah Legal Aid Society, Utah Department of Corrections, courts, licensed treatment providers and survivors of domestic violence. Committees

including Public Awareness, Training, Justice and Interfaith Leaders invite community members to participate in the success of our mission, to incorporate best practices in Utah's response to domestic violence and educate the public about domestic violence and the needs of victims. Through training, education and development of public policy, UDVC works to bring together a coordinated response. A statewide, toll free domestic violence information and referral line provides direct response to victims, services providers, family, and others. In addition, UDVC works with 21 local domestic violence coalitions throughout the state recognizing that through prompt availability and accessibility of domestic violence services delivered in a manner that preserves human dignity, and overcomes cultural, linguistic and economic barriers Utah will reduce domestic violence.

The **Vermont Network Against Domestic and Sexual Violence (the "Vermont Network")** is a non-profit organization representing 16 domestic and sexual violence programs in the state of Vermont. Each of our domestic violence programs is considered experts in their community on the physical, emotional and economic dangers women and their families face when attempting separation from their batterers. The Vermont Network as a whole is comprised of decades of experience and expertise regarding how the court system responds to women and children who are battered.

As a coalition, we work closely with our Programs offering support and information so that they can better serve victims of domestic and/or sexual violence. We know that the theory/process of victimless prosecution has created a safer way for victim/survivors to be involved in the criminal justice system. We have a history of working closely with law enforcement, both at the state and local level, and have found them extremely supportive of this technique which allows more success in holding batterers accountable for their actions. Should victims of domestic abuse be forced to testify

against their intimate partner/abuser, the level of accountability for batterers will decrease markedly reinforcing a message of acceptance and tolerance for violence in our society.

The **Virginia Sexual and Domestic Violence Action Alliance (VSDVAA)**, the non-profit state domestic and sexual violence coalition in Virginia, was incorporated in the Commonwealth of Virginia in 2004 after the merger of Virginians Aligned Against Sexual Assault (VAASA, incorporated 1980) and Virginians Against Domestic Violence (VADV, incorporated 1981). VSDVAA is a coalition of individuals, agencies and organizations committed to the elimination of sexual and domestic violence. VSDVAA is a diverse group of individuals and organizations that believe that ALL people have the right to a life free of violence. VSDVAA recognizes that sexual and domestic violence are linked to other forms of oppression, which disproportionately affect women, children and other marginalized people, harming individuals, families and societies as a whole. VSDVAA will use its diverse and collective voice to create a Virginia free from sexual and domestic violence—inspiring others to join and support values of equality, respect and shared power.

VSDVAA supports the use of civil and criminal remedies to 'hold domestic violence perpetrators accountable, and to protect victims of domestic violence. One such remedy is the use of evidence-based prosecution that protects the victim by not asking her to testify against her batterer.

Professor D. Kelly Weisberg, Hastings College of Law, University of California, San Francisco, is a nationally recognized scholar in the areas of Family Law, and Children and the Law. She has participated in federally-funded studies of family violence. Her current scholarship highlights civil and criminal responses to domestic violence, the reform of state laws addressing these issues, and the negative impact of

the *Crawford* ruling on the prosecution of domestic violence cases.

The **West Virginia Coalition Against Domestic Violence (WVCADV)** is a membership, statewide non-profit organization committed to ending personal and institutional violence in the lives of women, children and men. WVCADV member programs provide safe space and direct services for victims of domestic violence; the Coalition Statewide Office coordinates a strong network of shared resources that support policy analysis and social change work. These efforts provide statewide systems and local communities viable options needed in responding meaningfully to the needs of victims of domestic violence. In 1988, WVCADV established a Coalition Statewide Office (CSO) to work in the areas of public policy, legislative advocacy, resource development, public information, the development of statewide training programs, and collection and storage of domestic violence data. WVCADV is composed of fourteen licensed domestic violence programs that provide direct services to victims of domestic violence and a coalition statewide office that coordinates public education, training opportunities, and technical assistance to the domestic violence programs, allied organizations, and the general public. WVCADV's Board of Directors is comprised of representatives of each of the licensed programs. The licensed domestic violence programs provide services to all fifty-five counties in West Virginia.

WVCADV works closely with the courts in maximizing victim safety and holding perpetrators accountable for criminal behavior. For many victims testifying in court is too traumatic or dangerous to even consider. The victim may fear, and stalkers and abusers may have threatened, further harm to the victim or other family members if the victim testifies. Rape victims may find the thought of reliving the rape by testifying too much to bear. Young children who

have been sexually or physically abused may be too terrified to sit still in a courtroom to confront their abuser.

Since the mid 1990's, prosecutors have used evidence-based, victimless prosecutions to combat this problem, using such things as 911 calls, police and medical reports, DNA evidence and in the case of child sexual assault victims using videotaped interviews or live video from a remote location to allow prosecution to proceed without endangering or retraumatizing the victims. These victimless, evidence-based prosecutions have been highly successful, in allowing prosecutors to hold offenders accountable while keeping victims safe.

The *Crawford* decision has had a terribly detrimental effect on the prosecution of domestic violence, sexual assault, stalking and child sexual abuse cases. In some cases, prosecutors are not bringing cases to court if the victim won't testify, even if there is strong evidence that a crime was committed. In other instances, prosecutors are threatening victims with contempt of court, or even putting victims in jail to coerce their testimony.

The Sixth Amendment of the U.S. Constitution ensures the defendant's right to confront their accuser, and no one is looking to see this right denied. However, in a murder case, the victim is clearly not available to testify, yet the case proceeds based on evidence. We hope the Court finds the right balance between victims' need for safety and the rights of the accused.

The **Wisconsin Coalition Against Domestic Violence (WCADV)** incorporated in Wisconsin in 1978 (www.wcadv.org). WCADV is a statewide membership organization of battered women, formerly battered women, domestic abuse programs and all committed to ending

domestic violence. Through partnerships and strategic collaborations and education, advocacy and social action, WCDV works to prevent and eliminate domestic violence. We transform societal attitudes, practices and policies both about violence, and about women from diverse communities and their children.

A network of state domestic violence programs, WCADV serves as the voice of battered women and their children and those who provide direct services to them. WCADV has a long history of working at the state, local and national level to promote a strong criminal justice response to domestic violence. WCADV works within Wisconsin on a statewide and local level to implement the best practices in the prosecution of domestic violence cases. WCADV staff and member organizations provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. WCADV staff participate on the Wisconsin VAWA Justice Systems Training (JST) Initiative. WCADV has been involved in the reform of state laws addressing domestic violence for more than two decades, including revisions to Wisconsin's mandatory arrest law within the past year. WCADV supported and promoted the Congressional enactment of the Violence Against Women Acts of 1994, 2000 and 2005.

Women Empowered Against Violence, Inc. (WEAVE) works closely with adult and teen survivors of relationship violence and abuse, providing an innovative range of legal, counseling, economic and educational services that lead survivors to utilize their inner and community resources, achieve safety for themselves and their children, and live empowered lives. WEAVE staff attorneys carry a caseload of the most difficult, long-term legal matters that come into our offices, devoting more than 55 hours to each case. WEAVE strives to maximize our resources to make the legal system as accessible and understandable for domestic

violence survivors as possible by providing legal consultations to survivors proceeding *pro se*, referring cases to our network of *pro bono* attorneys, and offering free legal information clinics. WEAVE also collaborates with other organizations to operate the D.C. Domestic Violence Intake Centers, public/private partnerships that provide vital front-line assistance to battered women, offering information and guidance in seeking civil or criminal legal assistance. Whether because of her history of abuse, or because she may face dangerous and even life-threatening repercussions, a domestic violence victim can be understandably reluctant to cooperate with prosecutors. Because of this inability or unwillingness to testify in court, evidence-based or "victimless" prosecutions are crucial tools for the state to protect victims and bring their abusers to justice. WEAVE believes that the complex reality of domestic violence must be taken into account in interpreting the admissibility of evidence under the Sixth Amendment.

The **Women's Advocacy Project, Inc. ("the Project")** is a statewide legal non-profit organization organized under Texas law in 1982, and based in Austin, Texas (www.women-law.org). The Project promotes access to justice for Texas women and children in need. Started in 1982 as a legal hotline, the agency has evolved as an expert on legal issues affecting survivors of domestic violence and sexual assault, and now provides a range of services that promote the use of legal protections to end violence against women.

The **Wyoming Coalition Against Domestic Violence and Sexual Assault (WCADVSA)** is a not-for-profit organization incorporated in the State of Wyoming. The WCADVSA is committed to social change, education and systems advocacy for a non-violent society, respect for individuals having control of their own lives and the rights of victims and their children. The Coalition is a network of 24

statewide DV/SA programs. These 24 programs provide direct services to victims and their families and the WCADVSA is their voice at the state and federal level. The WCADVSA has a long history of working to promote a strong criminal justice response to domestic violence. The WCADVSA works with local law enforcement and prosecutors to implement best practices in the prosecution of domestic violence cases. Our Coalition provides training for law enforcement members at the State Law Enforcement Academy and some of those officers, in turn, take national domestic violence training to share with other law enforcement personnel, member programs and prosecutors. WCADVSA has been involved in the reform of our state laws addressing domestic violence and its effective prosecution for two decades. The Coalition is the foremost leader in the state in formulating new approaches and solutions to ending domestic violence.

APPENDIX B

LETTERS CONCERNING THE IMPACT OF *CRAWFORD V. WASHINGTON* ON DOMESTIC VIOLENCE CASES

The following statements represent the experiences of prosecutors, law enforcement, victim advocates and victims. These statements have been reproduced. Original versions are on file with Counsel of Record.

I. LETTERS FROM PROSECUTORS AND LAW ENFORCEMENT

LETTER 1 FROM: PAUL DEDINSKY, ASSISTANT DISTRICT ATTORNEY & DV UNIT DIRECTOR, MILWAUKEE COUNTY DISTRICT ATTORNEY'S OFFICE, WISCONSIN

I am a domestic violence prosecutor from Milwaukee, Wisconsin, and I am encouraging the Court to rule that excited utterances are "non-testimonial" as a matter of law. Statements unencumbered by forethought are critical to prosecuting domestic abusers. In my experience, current interpretations of *Crawford v. Washington* invite criminal defendants to engage in manipulative behavior to keep their victims from testifying in court.

In a case example from Milwaukee County, Wisconsin, (State v. Lesent Lewis, case # 2004CM8881), the defendant was charged in a criminal complaint with one count of misdemeanor domestic violence battery against his wife, the named victim, on November 14, 2004. According to the victim, she was afraid for her safety because the defendant had warned her in the past that: "if she ever called 911 on him, he would come back and kill her."

When the victim did not appear for trial on 1-26-2005, prosecutors sought to admit her excited utterance hearsay statement that she provided to a police officer. The defense

objected, arguing that admission of the statement would violate his right to confrontation.

Following a hearing, the trial court ruled that a portion of the victim's statement would be admissible as an excited utterance. The case was adjourned for further proceedings. In the interim, the defense sought review by means of interlocutory appeal to the Wisconsin Court of Appeals. In challenging the trial court's decision, the defendant relied heavily on *Crawford*.

Acting upon intuition, a prosecutor contacted the police agency where the victim resided. On March 9, 2005, the police drove to the victim's home in order to check on her welfare and safety. No one was home. According to police reports, a neighbor explained that the defendant was seen that morning at the residence and regularly comes to the residence.

Police returned later that evening to the residence. After knocking at the door, lights in the residence were extinguished. For some time, no one answered the door. A small child then peered through a kitchen window at one police officer. Finally, the wife of the defendant answered the door. She allowed police to enter the residence. Police asked if she had seen the defendant, whose bail conditions included a provision that he have "no contact" with her. According to police reports, the 4-year old child then exclaimed: "My daddy's sitting in there . . . in the living room." The defendant was located sitting on a chair in the darkened front living room. For disobeying the trial court's bail order of "no contact" with the victim, the defendant was charged with bail jumping in a new criminal complaint.

Despite the defendant's arrest for bail jumping and the filing of new charges, defense attorneys still filed their appellate brief on March 10, 2005, arguing that the defendant had been

denied the opportunity to confront his accuser. Eventually, the defense dropped the interlocutory appeal.

While claiming the prosecution and the judiciary were preventing him from confronting his accuser in court, the defendant apparently saw little restriction on his ability to confront his accuser outside of a courtroom. The defendant's actions in disobeying the court's orders and then trying to fool the court – while wielding the *Crawford* decision as his sword—struck me as particularly manipulative.

The above dynamic of "power and control" is a prototypical example of a domestic abuse case. The defendant first warns his wife of the potential dire consequences of reporting his abuse to a 911 operator. Then a violent episode occurs. Then the defendant disobeys the court order to have contact with a prohibited witness. The witness fails to appear in court. Implicit within domestic abuse cases is the threat of future harm, and that is precisely why domestic abuse is referred to as a "cycle of violence."

The ongoing power that batterers have over their victims is apparent from our statistics. Each year, in Milwaukee, prosecutors review 10,000 misdemeanor and felony domestic violence charges. In 2005, forty percent (40%) of domestic violence cases were dismissed. **Ninety-six percent (96%) of those dismissals occurred because victims did not appear in court for trial.**

Although the vast majority of defendants facing domestic abuse charges in Milwaukee are released on their personal recognizance, some more serious offenders are held on cash bail in the Milwaukee County Jail. Several years ago, domestic violence unit prosecutors began to obtain actual copies of phone calls made by defendants held in the Milwaukee County Jail to their victims. This has given us the

opportunity to hear defendants threatening and manipulating their victims and the witnesses against them.

Enclosed with this statement is a DVD of a news story from the local FOX news affiliate in Milwaukee. The news story tracks four domestic violence cases. Based upon the conduct of these four offenders, different types of witness tampering charges were prosecuted. The statements of these offenders serve dually *forfeiture of wrongdoing* evidence. Unfortunately, most of the time, domestic violence defendants are not held in the jail pre-trial, and prosecutors never receive evidence of the intimidation.

The taped telephone conversations from jailed defendants are illustrative of evidence courts rarely get to hear. Violations of bail conditions are rampant. In domestic violence cases, abuse is typically not encapsulated in a singular incident or charge of criminal conduct. Domestic abuse occurs in the context of a relationship, one that can breed intimidation and manipulation from those seeking to exert power and control over those more vulnerable victims.

Before writing this letter, I reviewed the National Association of Criminal Defense Lawyers' amicus briefs, which describe to you the phenomenon of "evidence-based" or "victimless" prosecution cases. However, never do those amicus briefs explain to you why prosecutors must proceed forward with their cases in the absence of victims; many defendants are responsible for threatening or otherwise dissuading their victims from appearing in court. These defendants ensure that their accusers' statements will never be tested in the crucibles of direct or cross-examination.

It is my opinion that *Crawford* is being used as a tool to suppress excited utterances and similar firmly rooted hearsay exceptions. Once a victim is intimidated from appearing in court, the defendant is nearly always rewarded with the dismissal of his charges. This is untenable. This is a

miscarriage of justice that can only be righted by the Court's decision holding excited utterances to be non-testimonial as a matter of law. In the end, the Court needs to adopt a position that will promote victims to testify in court free from intimidation and harassment

LETTER 2 FROM: HARLAN H. F. WOOD, ASSISTANT DISTRICT ATTORNEY, CHEROKEE COUNTY JUSTICE CENTER, CANTON, GEORGIA

As an Assistant District Attorney in Canton, Georgia, I have witnessed directly the impact of the *Crawford* decision on one of my cases. The background that I am forwarding comes from the case: *State of Georgia v. Steven Tyler Miller.* This case was indicted and tried prior to the *Crawford* decision. *Crawford* issued, and my case was appealed based mostly on the *Crawford* decision.

The victim in my case did not testify. While I cannot say with certainty the reasons for her decision not to testify, I suspect it had something to do with her fear of the Defendant and with the fact that she moved to another state to live with family and escape her abuser. As a result, I relied on the Res Gestae exception to the hearsay rule at trial. The Victim's statements were allowed to be presented through the responding officer. Defendant was ultimately convicted of Count 1: Aggravated Assault (O.C.G.A. § 16-5-21), Count 2: Terroristic Threats (O.C.G.A. § 16-11-37), Count 3: Battery under the Family Violence Act (O.C.G.A. § 16-5-23.1), and Count 4: Obstruction of 911 Emergency Telephone Call (O.C.G.A. § 16-10-24.3).

The *Crawford* decision issued following a jury verdict resulting in a conviction in my case. The Court of Appeals of Georgia considered, among other things, whether the officer's statements as told him by the victim were admissible in view of *Crawford.* They determined that those statements were in fact **inadmissible**. That left them with a decision to make

about how those inadmissible statements, that were considered by the jury, affected the case. After considering everything, they concluded that without considering the inadmissible evidence, there was insufficient evidence to convict Defendant of Count 2: Terroristic Threats and Count 4: Obstruction of a 911 emergency telephone call. As such, they reversed the convictions on those two counts.

It turns out however that the Defendant testified at his trial. In doing so, the things that he stated, ultimately, according to the court of appeals, were sufficient to affirm the conviction on Counts 1, and 3. Count 1, Aggravated Assault is a felony in the State of Georgia which carries a 1-20 year sentence. Defendant was sentenced to 20 years with the first 4 to be served in custody. As of today, it is my understanding that he remains in custody.

The impact of *Crawford* on my case is that two counts for which the Defendant in the case I presented were reversed. It did not impact the sentence though in my case since the driving charge in sentencing was Count 1, Aggravated Assault. Please keep in mind though that two counts for which Defendant was convicted by a jury, were reversed. Had Defendant not testified, it is my belief that the entire case would have been reversed. Victim has two children with Defendant. She, at the time, had been together with Defendant for nearly 18 years, and had endured a life of abuse, that ultimately resulted in self-medication with alcohol. When I told her that I was not going to dismiss the case—the opposite of which she undoubtedly was used to hearing upon her request—she made herself scarce. As things stand today, the same situation would most likely result in acquittal. Post *Crawford* domestic violence defendants have absolutely no reason to testify. That certainly would have been the post *Crawford* advice Defendant Miller would have received from counsel. While the ultimate impact of *Crawford* on *State of Georgia v. Steven Tyler*

Miller is negligible from a sentencing view, the message sent is crystal clear—that is, if domestic violence victims do not testify, no conviction follows.

LETTER 3 FROM: BRANDELYN NICHOLS, VAWA PROSECUTOR/ ASSISTANT CITY ATTORNEY, KANSAS CITY, KANSAS

As a VAWA Prosecutor/ Assistant City Attorney in Kansas City, Kansas, I have had daily contact with the effect of the *Crawford v. Washington* ruling. Prosecution of domestic violence crimes rely almost solely on out-of-court statements.

I have had success in municipal court arguing that a domestic violence victim does not understand or expect that her 911 calls or excited utterances will be used as testimony in a trial against the defendant. However, if the case is appealed to the district court, my success in the prosecution of these cases is quite limited. The district court judges are hesitant to apply the hearsay exceptions prior to *Crawford* and without definitive case law, refuse to allow out of court statements in domestic violence cases after the ruling in *Crawford v. Washington*.

I do not frequently use warrants or impeachment of victims to ensure convictions. In my experience, it may lead to a successful record, but it actually harms the victims in future prosecutions. For example, if the victim of domestic violence has children who will the children, stay with while she is in jail awaiting trial, in the home with the abuser? What affect does that have on a divorce or custody case either pending or in the future?

It is imperative to have some guidance on what constitutes testimonial statements versus non-testimonial statements. I would argue a victim of a domestic violence crime, unless she is also a criminal law attorney, has no expectation that a 911

call or excited utterance to a police officer would be used as testimony against her abuser. A 911 call or excited utterance is in effect the same as a cry from the street corner for help and therefore should not be held as testimonial.

LETTER 4 FROM: PROSECUTOR, TWIN CITIES METROPOLITAN AREA, MINNESOTA

I am a prosecutor in the Twin Cities metropolitan area in Minnesota. I handled a case once involving a woman who had been "with" the father of her children for about 8 or 9 years by the time she was 24. She had known him at the age of 14, and he had a conviction at that time for depicting a minor in a sexual performance (filming a sex act with her). She had two children with him by the time she was 20 years old.

This man was in a gang and was extremely physically and mentally abusive. It was clear by the time I encountered these people that he had dominated and controlled her life since the moment she became involved with him.

The case I charged out occurred about 2 months after she had broken off the relationship—often the most dangerous time for an abused woman. He still had a key to her apartment, and had had some gang buddies watching her apartment. She had a male friend over for a visit, and suddenly three or four men (including the abuser) burst into her apartment using the key. The male friend fled, and the other men stood by as the abuser took her to a back bedroom and beat and kicked her repeatedly. He gave her multiple bruises and knocked out a front tooth, which is first degree assault in Minnesota.

The men left, and she drove herself to the emergency room. She initially protested against calling the police, but eventually (perhaps without her knowledge), the police arrived and took her statement, in which she said that the "father of her

children" had caused her injuries. She also told the medical people this description of the assailant. She didn't say his name.

As time went by, she went back to her work and life, and the abuser (contrary to court order) contacted her and her children. Meanwhile, I had charged him with several severe counts involving lengthy prison sentences, especially given his lengthy criminal history. The woman had chosen not to use advocacy services.

Not surprisingly, the defense attorney got a call from her on the eve of trial asking how she could "change her story." He ethically reported this to me, and I met with her. She said the same thing to me: how could she "change her story?" I told her I couldn't take a statement from her—only the police could do that.

So, I was stuck knowing that the likelihood that she would truthfully identify the assailant from the witness stand was unlikely, and that I really didn't have her giving his name at any point. Clearly, this woman was isolated and alone, and was rightfully very afraid of not only this abuser, but also of his gang buddies who would be free, even if the defendant went to prison.

Crawford prevented the use of her out of court statements. I had no witness to actually name the assailant (the man who was visiting her claimed not to see who entered the apartment). The end result was that I had to drastically reduce the prison term available, and also to agree to probation of all things for this repeatedly violent offender. I do not know whether he is still on probation, but even if he serves a prison term, it will be nowhere as long as the one he deserves or the term which would keep his victim and children safe.

Thus, my inability to use her statements meant that I could not level a just punishment against this gangster for his repeated abuse of the mother of his children.

LETTER 5 FROM: PROSECUTOR, LEE'S SUMMIT, MISSOURI

I am the domestic violence prosecutor in Lee's Summit, Missouri, a suburb of Kansas City. The *Crawford* opinion has had a devastating effect on my ability to prosecute these cases. As the decision filtered through the defense attorney community, attorneys began telling their clients that if the victim did not show up the case would be dropped. The abusers then put pressure on the victims; the appearance rate of victims plummeted, as did the conviction rate in domestic violence cases.

This case has set the prosecution of domestic violence cases back twenty years. I was here in the bad old days when a man would be holding the arm of his wife as she was telling the judge that she did not want to prosecute the case. Do we really want to return to that era? In any other case, such interference would be construed as witness tampering. In these cases it's considered a "relationship dynamic." If an abuse situation is so bad that the police are called in, it is no longer a "domestic" matter. It is a crime, and should be treated as such. 911 tapes, police reports, and excited utterances are used in the prosecution of other crimes—why not domestic violence?

LETTER 6 FROM: POLICE OFFICER JEREMY ROMO, ST. LOUIS COUNTY POLICE DEPARTMENT, MISSOURI

As a police officer for the last six years I have witnessed domestic violence and the devastating effects that it has on the victims, as well as, their children. Victims are forced to live in fear. They are subject to verbal and emotional abuse that makes them feel like they are no longer human. I have witnessed women brutally beaten. Unfortunately, I have also

witnessed victims lose their lives at the hands of their abuser. I patrolled the some small area for three years and over those three years I came into contact with some domestic violence victims on several occasions. I would get to know their names and the names of their children. Some of those repeat victims were unable to leave their abusive relationships for very legitimate reasons. Some had become isolated from their family and friends and had nowhere to go. Others had not been allowed to get any education or formal job training and could not support themselves and their children it they left. Some of the victims who stayed did so because their partners had told them over and over about how if they tried to leave he would hunt them down and kill them and their children because, "if I can't have you nobody will." Many nights I raced to the homes of these victims that I had grown to know and worry about for yet another domestic violence call. As I drove I hoped that this wouldn't be the night where that victim lost their life. Unfortunately, domestic violence victims often pay the ultimate price with their lives. There were several cases in the St. Louis area in 2005 where a victim left an abusive relationship and the abuser found the victim and killed her and in some cases her children.

Domestic violence perpetrators are masters of control and manipulation. They can be extremely emotionally and physically abusive one minute, but they can turn their abusive behavior off at the drop of a hat. When the police arrive the victim is often yelling, crying, and acting erratic, which is not unreasonable because of what they have been experiencing. They are looking for help, but they probably know from past experience that they may not get the help that they deserve. This absence of help could have been due to poor police response or the abusers ability to turn off his abusive behavior and convince the police that everything is fine or that the victim is the problem. Hundreds of times I have responded to a domestic violence call to find a victim who is hysterical and her partner is completely calm. It is not uncommon for the

abuser to point to the victim and state, "Look at her she is crazy". Usually if a police officer investigates further by talking to witnesses or examining the available evidence they will find that a crime did occur. The victim is understandably upset. She has taken a chance by involving the police and she knows if her abuser can convince the police that everything is fine they will leave and she will be subject to more abuse for trying to involve the law.

When I make the argument to others that abusers are controlling and manipulative, critics will ask me how I can possibly know what goes on before I arrive at a domestic violence scene? How can I support my claims that it is common for abusive men to lie to the police and abuse their partners to the point that they cannot leave the relationship without fear of further abuse or even death? What proof do I have?

On top of seeing domestic violence as a police officer I am also an instructor in a batterer intervention program. Two or three times a week another instructor and I sit in a room with several men that are mandated by the conditions of their probation or parole to complete the class. As instructors, we try to convince the men to make the choice to hold themselves accountable for their abusive behavior. We try to educate the men about violence and abuse and show them how they have used it to control their partners. For almost three years I have listened to batterers talk about their abusive behavior. We stress that we are not only interested in the behavior that convicted them, but also their post abusive behavior. As the men learn about domestic violence and begin to hold themselves accountable, a picture begins to emerge. The picture that emerges is one of a pattern of physical and emotional abuse that has been devastating to the life of the victims. Specifically, many abusers admit to

manipulating the police and court system to avoid accountability. They admit threatening their partners with taking the children, physical abuse, or even death if they testify against them and in the past their abuser has made good on his threats.

A majority of the men in the batterer programs were convicted using victimless prosecution. Victimless prosecution takes a huge burden from the victim and increases her safety. From my experience spontaneous utterances made in the heat of the moment when the incident is fresh in victims mind are honest and accurate. Spontaneous utterances are made before the victim has the opportunity to think of the consequences of speaking truthfully about how she was victimized.

It takes weeks and sometimes months for the men in the batterer program to begin to hold themselves accountable and admit their abusive behavior. Some men never hold themselves accountable. But, many of the men who complete the program tell us how they are glad they attended. These are the same men that stated they did not need to be in the program when they first started. They are also the men who, by their own admission, committed terrible acts of violence and abuse towards their partners. They feel that without the batterer program they would have continued to be abusive. Several of the men have stated that they are glad they were convicted and sent to the batterer program. Yet, these are the same men that would have never been convicted without victimless prosecution. Domestic Violence is an epidemic in our society, but the men and women who have committed themselves to help the victims are making a difference. Victimless prosecution in cases of domestic violence is an invaluable tool. It not only protects domestic violence victims, but it often leads the perpetrators to make positive changes in their lives through education and counseling.

II. LETTERS FROM VICTIM ADVOCATES

LETTER 7 FROM: KERRY HYATT BLOMQUIST, LEGAL COUNSEL, INDIANA COALITION AGAINST DOMESTIC VIOLENCE

In Marion County, Indianapolis, Indiana, and communities nationwide, the *Crawford* case has had a significant and startling effect on the prosecution of domestic violence criminal cases. Our most recent statistics from Marion County, Indianapolis, Indiana indicates that slightly over 24% of felony domestic violence cases and 27% of misdemeanor domestic violence cases are dismissed, primarily, according to prosecutors, because the victim either recants his or her testimony or fails to show up at trial.

Our obvious concern if *Hammon* is reversed is that not only will that dismissal percentage increase substantially literally overnight, but clearly many, many cases in the future will not even be appropriately investigated or filed if it appears the victim is reluctant to testify against the abuser. This effectively leaves the decision to prosecute within the control of the abuser, if the abuser knows that charges would be dropped if the victim was too intimidated or scared to testify

The outcome of this case is huge. Please do not disarm the system that holds batterers accountable. The decision to prosecute must be left in the hands of effective law enforcement and prosecutors, not left to the will of the batterer.

LETTER 8 FROM: TARA L. MUIR, LEGAL DIRECTOR, NEBRASKA DOMESTIC VIOLENCE SEXUAL ASSAULT COALITION

In Nebraska, the *Crawford* decision had a significant effect on the prosecution of domestic violence criminal cases.

Some county prosecutors were just beginning to try cases without the victim's testimony, mainly using the police report and the 911 call, with some success. Other prosecutors who have been slow to understand the dynamics of domestic violence were reluctant to go forward without a victim's testimony before the *Crawford* decision. These prosecutors used the decision as one more reason to not prosecute a case at all without the victim testifying, regardless of other witnesses or admission of the defendant.

Many reasons exist why a victim is reluctant or unwilling to testify. In one county, a prosecutor reported a case where the defendant had a friend come to his house the day of court and "baby-sit" the victim to make sure she didn't come to court for the trial. In a previous case, this same batterer threatened the victim not to show up but the prosecutor was able to get a conviction without her, using other witnesses to the offense. The batterer eventually elevated to felony charges, and the victim was able to come to court for the felony trial and the minute he saw her, he plead guilty and was sent to the pen for several years.

LETTER 9 FROM: MARY HAVILAND, ESQUIRE, CO-EXECUTIVE DIRECTOR, CONNECT, INC., NEW YORK, NEW YORK

I am a co-executive director of CONNECT, Inc., located in New York City, New York. CONNECT is dedicated to the prevention and elimination of family and gender violence and to the creation of safe families and peaceful communities. CONNECT transforms the attitudes, beliefs, and behaviors that perpetuate family and gender violence and addresses these complex issues through prevention, early intervention services, and community empowerment. The following are examples of cases from our Legal Advocacy Helpline or our program with the 25th Precinct in East Harlem.

Case 1

I have been working with this client since 5/7/05. This client is a survivor of domestic violence who is working full-time and attends a college program. Her partner was arrested on 3/20/05 for Harassment. Our client has two kids, one of whom is the son of the defendant. This client suffered beatings, harassment and threats from her abuser. She has also suffered the pain of hearing, listening and seeing her kids including the one child she has in common with the respondent being harassed and abused by the defendant.

The defendant called the client's job while an order of protection was in effect and threatened that if she did not drop the charges, he would continue to harass her and her kids. The defendant once called the client's job to tell her that "[he] has tried to kill her before, but that the next time he will not fail to do so." The respondent went to the oldest son school to harass him about where they lived because he wanted to know where my client was now living. The client's oldest son gave the defendant a false address in order for him not to continue to harass him.

I, as Legal Advocate, called the A.D.A. and inform her of what was going on. The A.D.A. obtained an order of protection for the respondent to stay away from our client's children. The A.D.A. informed me that this case was set to go to trial and the client would have to testify. When I tried to discuss this with the client, she was initially reluctant to accept my help because of the fear she felt of testifying against the respondent. The client felt that she was being betrayed by the system, and that no one was really concerned about her safety if she did testify. The client's biggest fears were that testifying against the respondent would be dangerous for her and her kids, fearing that the respondent would eventually try to hurt her and her kids even if that meant after he served time in jail.

The respondent had been arrested in 2003 and was in jail for 18 months, and when he came out he continued his abuse towards the client and her kids. The client did not go back with the respondent after he came out of jail, but that did not change the fact that he still felt he had control over the client, kids, and the client's life. I explained to the client I was here to help her. I told the client that I would do the best I can to make sure she feels safe throughout this process, and discuss her concerns with the A.D.A. I also referred our client to counseling which she has continued to receive throughout the duration of the case. The A.D.A. explained to the client that before she asked her to testify, she would call her to prepare her for court, and would find ways to make her feel safe throughout this process. I also told the client that I would try to find an escort to escort her to family court when testifying against the respondent. This case has not gone to trial yet. The respondent has refused accept plea offers by the District Attorney's Office.

Case 2

A past client of mine, during our initial intake and subsequent conversations, has vehemently conveyed to me the fears she has of facing, let alone testifying, against her boy-friend in his upcoming criminal trial. My client was brutally acquaintance raped twice (not by her boyfriend), the last time in front of her child. At that time, her boyfriend and she were separated.

However after the rape, my client reconciled with her boy-friend who beat her when she refused sex with him. He went further to question why she *could* have sex with the man who raped her and not with him, a man who claimed to *love* her. My client suffered numerous bruises and serious emotional trauma. She has since been hospitalized and undergone surgery.

One of the fears she conveyed to me was that every time she sees her boyfriend, or even a photo, she relives both the rape and battering. To my knowledge, my client has not been diagnosed with Post-Traumatic Stress Disorder (PTSD), but she exhibits common symptoms of PTSD such as flashbacks triggered by anything that brings to mind an aspect of the rape, depersonalization and amnesia. Reliving the trauma, while testifying, would be extremely difficult for my client for these reasons.

LETTER 10 FROM: COURT ADVOCACY PROGRAM, COLLECTED BY FAMILY RESCUE, INC., CHICAGO, ILLINOIS

Client was referred to our program by a Chicago police detective. The client explained that she previously filed criminal charges against her boyfriend for domestic battery, received an Order of Protection and had a warrant issued for the offender's arrest. The day before the client and offender were supposed to appear in court, the offender waited for the client outside of her home and attacked the client leaving injury. The offender threatened the client by saying if she showed in court tomorrow to proceed with the criminal case he would kill her. As a result, the client did not appear and her case along with the order of Protection was terminated. When asked why the client didn't go to court, the client stated that she was embarrassed about her injuries and believed the offender would really come for her and carry out his threats.

LETTER 11 FROM: MITHRA MERRYMAN, ESQUIRE, BOSTON COLLEGE LEGAL ASSISTANCE BUREAU, MASSACHUSETTS

Grace [not her real name] is 32 and has three children with her husband. I was connected with Grace through a special project funded by the Department of Justice and run out of Greater Boston Legal Services. The women I work with through the hospitals, as opposed to those I represent in court, are at the early stages of their process of understanding that

what they go through at home is not "normal" and that their husbands are, most likely, not going to change.

Grace's legal problem, as she identified it, was that she did not wish to testify against her husband in an upcoming criminal trial. Grace spent approximately 20 minutes explaining to me her and her husband's interactions regarding a shirt she apparently didn't launder correctly. This led to a *20* second explanation of how he punched her twice in the face because of it. She called the police and they did the right thing: they arrested her husband. Grace then explained that "the law is of no help" to her because of what happened after her husband was arrested and therefore she did not want to cooperate with the prosecution of her husband's case anymore.

This is what happened to Grace after her husband was arrested. First, her sister-in-law, who had been living with them and helping to care for the children while she was at work, was upset at Grace for calling the police and left. Since her husband was the only other person who cared for the children while she worked, she was left with no child care. Second, when she called in sick at work (because her face was swollen and bruised) her employer told her the next sick day would be her last working with him. The next day she confided what happened over the phone to the home-care worker who helps with her eight-year old mentally retarded child. While the worker was sympathetic, she called back later and abruptly cancelled the next three home-care visits. Desperate, she called her own mother for help with the children. Her mother told her that she couldn't help and that she should go back to her husband. Finally, Grace realized that without her husband's income, without child care and without a job she would be unable to pay for rent, food and all the other necessities of herself and her children. She did what any reasonable person would do under the circum-

stances: she begged her husband to come home and apologized for calling the police.

Part of my work with Grace was trying to change her conception that "the law" didn't work, to an understanding that her community and our society is what failed her. Still, her story is emblematic of the reality of many women who are mothers and wives: when they are abused in the home their responsibilities toward their children and the lack of available resources and support for them will often be determinant in whether or not they cooperate with laws that punish their abusers but don't provide the necessities of daily life.

LETTER 12 FROM: NORTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE

Evidence-based prosecution is an essential component of effective intervention in domestic violence cases so that perpetrators are held accountable and victims are protected from future violence. Domestic violence homicides are one of the most preventable crimes in that the criminal justice system often has an opportunity to intervene prior to a homicide. If perpetrators are held accountable through successful prosecution of domestic violence crimes, future violence and homicides can be prevented. Evidence-based prosecution provides the tools necessary to achieve this important goal.

When the Court handed down its decision in *Crawford v. Washington*, it set back efforts by North Carolina prosecutors to use evidence-based prosecution to secure convictions in domestic violence cases. Out-of-court statements made by domestic violence victims are often critical components of any evidence-based prosecution, and the *Crawford* decision called into question the admissibility of such statements in a criminal trial. Justice Scalia's opinion in Crawford declared

that "testimonial" statements made out of court would only be admissible if the declarant was made available to the defendant for cross-examination. However, the opinion conspicuously avoided a detailed definition of what "testimonial" meant, and as such, the lower courts have been left in turmoil as they struggle through this new and uncertain jurisprudence of "testimonial" statements.

These out-of-court statements are especially important in the evidence-based prosecution of domestic violence offenses. For a variety of reasons—economic pressure, the perceived moral and legal obligations of marriage, and fear of further physical violence, among others—the victims of domestic violence are often reluctant to appear in court and testify against their abusers. Evidence-based prosecution calls on prosecutors to collect evidence of domestic violence crimes which will allow them to prove these offenses with or without the participation of the victims. Because the out-of-court statements of domestic violence victims often play an important role in evidence-based prosecutions, the Supreme Court's decision in *Crawford* severely impeded these efforts.

It is within this uncertainty that North Carolina's prosecutors now struggle to prove domestic violence cases. The state's appellate courts have handed down a few rulings which attempt to define more precisely the parameters of the *Crawford* decision, but prosecutors and judges anxiously await further clarification from the United States Supreme Court. In the absence of clear rules, individual trial judges are making their own determinations as best they can. But without a workable and mutually agreed upon definition of "testimonial" statements, these well-intentioned efforts can result in a patchwork of inconsistent and conflicting rulings across the state.

LETTER 13 FROM: DONNA PLIER, PROGRAM DIRECTOR, GUARDIAN ANGEL COMMUNITY SERVICES, ILLINOIS

In our experience, if the Crawford decision is upheld it will eliminate the teeth from the police power of a directed arrest. Even if the officer makes an arrest on the facts he views, without a witness, there can be no prosecution.

For example, in a recent case, a woman came into the Order of Protection office seeking an OP after her husband scalded her with a pot of boiling water. She filed the OP 48 hours later, but then called to say that she wished to withdraw the complaint because of what were probably financial considerations. The OP process was explained as was the fact that we have no control over the criminal process. This woman has repeatedly attempted to convince the state attorney's office to withdraw the charges. The state declines to do so, having made felony charges. The State's Attorney is threatening to subpoena the client to court to testify. The client is threatening to claim police coercion. All believe this abuser was intentional in his efforts. If his wife is compelled to testify against him and refuses to do so, he will be released. Only through hearsay of the police and paramedics, could this case go forward.

LETTER 14 FROM SOUTHWEST VIRGINIA VICTIM ADVOCATE

Why do victims not want to testify? They are humiliated, embarrassed, intimidated, sleep deprived, paranoid and afraid. They've been told "I'll take the children." "No one will believe you." "You are stupid." They've been isolated from employment, family, friends, and church.

If she testifies, she is often verbally berated by the defense counsel, the abuser and the Judge. Her case is heard without a prosecutor, (Commonwealth's Attorney's are not required to prosecute misdemeanors). She's often told after the case is

dismissed, she doesn't need a protective order due to having a mutual injunction as part of the separation agreement. If she says she fought back or argued during the altercation, she's seen as contributing. If she gets angry while testifying, her attitude, it is hinted, may have contributed to the incident. If it is the first time an assault has made it to court, he's usually given unsupervised probation and possibly sent to the batterer's intervention program. He walks out free and she walks out with no protection to the words: "I'll take the children." "No one believed you." "You are stupid." And again, she's humiliated, and afraid.

LETTER 15 FROM: ANONYMOUS VICTIM ADVOCATE

I am a victim advocate who is working with a victim of a domestic violence rape. When I responded to the scene of this rape the victim was in nothing more than a towel. The investigation was completed, the victim was taken to the Sexual Assault Treatment Center, and an arrest was made. In this state there is a Pre-Filing Interview with a state attorney. I informed the victim of this procedure and she was very reluctant to attend because she was afraid of retaliation from the offender's family. She eventually agreed and we went to the interview along with the arresting detective. She stated in the interview that she would not testify because of her fears. The state attorney told her that if she did not testify that she could be subpoenaed and if she did not show at the trial she could be arrested. This is not the way we should treat victims. As a victim advocate I have been faced with this problem many times. I have been with my police department for 25 years and would like to understand why as an advocate for victims of violent crime I cannot speak on their behalf when there is such fear of retaliation and intimidation. I have had many other similar cases like the one stated above. I would be happy to do whatever I can so that I can have the voice that the victims fear to have.

LETTER 16 FROM: ANONYMOUS ADVOCATE

As an advocate for domestic violence and sexual assault victims in a rural community, I find that having the ability of victimless prosecution is essential in saying to perpetrators of this crime that what they did was wrong and will not be tolerated by the community. There are many reasons why a victim will not testify. One of the main reasons is fear from threats made by the abuser. If a perpetrator is able to go free because he has threatened the victim and the court dismisses the case it will just reinforce to him that his tactics work.

LETTER 17 FROM: ANONYMOUS ADVOCATE

I am our Director of Legal Projects—which means that, in addition to counseling, I do restraining orders for victims. I have seen women, when faced with the ideas of testifying, leave the area or return to their perpetrator rather than testify. Some counties in California issue warrants for victims who refuse to testify. Talk about revictimization!!!

It is important for the system to understand that these victims, and their children, have been threatened with their lives if they testify. Women are killed everyday in domestic violence situations. Please look seriously at the repercussions of forcing victims to face an abuser who has always had all the control and still wields the power.

Additionally, a big concern of victims is that so often the perpetrator is sentenced to credit for time served, stay away (from the woman), and three years summary probation. Why would a person risk their life for this? There are no safeguards. When the stay away order goes into effect it does not include the children, so the perpetrator is free to pick up the children and take off. What better way to get a woman to return? This all happens whether they testify or not. Again, why should they put theirs and their children's lives at risk.

Perpetrators are not prohibited from calling their victims when in jail. Women are then receiving calls demanding they change their story or 'pay the consequences.'

I pray this information helps to make a difference.

LETTER 18 FROM: ANONYMOUS ADVOCATE

I worked as a social worker for the Massachusetts Dept. of Social Services for nearly 15 years. I dealt with many child victims of sexual abuse and many adult victims of domestic violence during those years. None of them would have been able to testify in court without suffering further emotional trauma, and were too emotionally fragile to have that even be considered. What can anyone with common sense be thinking that this can even be something we need to debate? How can we as a society in good conscience even consider making victims re-experience their traumatic experiences in a courtroom? When will we stop putting the rights of the accused ahead of the victims? As Bob Dylan wrote many years ago, "The answer is blowing in the wind."

III. LETTERS FROM VICTIMS

LETTER 19 FROM: ANONYMOUS VICTIM

I have been trying to get divorced from my abuser for almost 3 years. After 9 years of sexual & emotional abuse to me, some violent sexual assaults, I left with my children while he was away on a business trip. I reported the most violent of the assaults to the police, my children's therapist reported their abuse to Child Protection. I could not even bring myself to talk about some of it until after about 10 months of intense therapy. There are still some aspects of my relationship with my spouse that I may never be able to talk about.

I testified in open court. During & after the court hearing, I was accused of being a vindictive, bitter wife, making the story up and that I told my children to say they were abused. When he was confronted with the fact that he had 2GB of rape and bondage porn on his computer and having an affinity for teenagers (all in open court) he admitted to liking to control his partners and to keeping me on an "allowance." He also admitted to a drinking problem and acting out his fantasies with college students. I did not understand truly till after the court hearing about circumstantial/physical evidence. It seemed to me there was enough.

So he was ordered to go to therapy with a sexual predator guru. The court system kept him away, for awhile. However, since he is the biological father of the children, he is allowed to see them, and through this relationship he continues to harass me, intimidate and revictimize me and my children.

Even today, I am court ordered through the Texas family court to go to "joint parenting" sessions with him. The rape that he did to me was bad enough, the rape by the court system is worse. The amount of pain and humiliation in talking about the manipulation, the rape and the abuse and then being reabused in the court system, told it was my fault, was about more than I could bear. I was on massive sleeping pills, suffered with PTSD—given antidepressants and anti-anxiety medication, and lived with my parents for almost a year until I was functional again.

Knowing what I know now, would I do it again? I doubt it. What was the point? Nothing changed. He can manipulate the system and has never been held accountable. But if I take my children to another country, I would be found guilty of child abduction. He has threatened to kill me, but the court system doesn't care. Yes I had a protective order for awhile. . . I guess maybe my kids and I would have justice if he kills

me, but I doubt it . . . he'd charm his way into minimum time and parole . . . he's been in therapy so he's all better, right?

LETTER 20 FROM: ANONYMOUS VICTIM

My story covers many of your points and a span of almost 20 years. I hope and pray that my story will show the court that a consideration for victims should be a part of the judicial process. My abuse began in 1988. While some incidences may have been seen as borderline, several where obvious abuse—a broken nose, cracked jaw, numerous bruises—usually around the neck. Before the births of the children that we share, born in 1991, and 1992, I withheld testifying because of his threats to me—afterward this included threats regarding the children. I was not stupid or uneducated; I came from an upper middle class home. It all started so gradually that I did not see the cocoon of helplessness and no-contact that he had enveloped me in.

I had gradually been cut off from friends and family so that I truly believed I had no one to help, and as in the case of some abusers, mine had friendships with some of the police. He left me with three young children (the 92 birth is a set of twins) but insisted that I remain faithful to him as he lived and dated several other women. As I could not afford to work and pay daycare, I was reduced to living on welfare—and he used this against me also. He stole what little money I had on many occasions, raped me and beat on several occasions.

When the police would come, he would laugh and state, "you know those welfare women", and they would laugh along with him. Even with prodding from medical staff, I almost always refused to testify—if the police wouldn't believe me who would? After the children, there was his added threat that he would follow through with social services and have the children taken from me, as on some occasions I had fought back with the abuse—I have never understood this one

either—what would the law have you do instead while someone is strangling you, throwing you up or down a flight of stairs, or slamming you in the back with a 2x4 board? Most of the more serious incidences where reduced to obstructing an officer or similar reductions that had nothing much to do with the actual crime he had committed.

Things began to change when I found an at-home study program to finish my degree. I talked with professors at the university and took exams via proctor. I made new friends and old friends and family began to renew their faith in me. My parents helped me locate to a new town, almost 200 miles away. To the avail of friends and family, it only helped somewhat—he continued to try to pursue me with threats again about the children.

The last time he beat me was in November of 1994—and I am shaking even now as I recall it. I told him "no", in no uncertain terms, "no". I would not do this anymore. Our children where at daycare, as in my new location, I had found assistance to work part-time and go to school. The "no" was met with quite a beating. He truly tried to kill me. In an instant of the madness, when I could barely walk—(at this time I had broken ribs and severe swelling and bruising around the throat)—I pretended to vomit—my abuser's weakness was a bad stomach—as he turned to face the other direction, I went for the 2nd story window as quickly as I could. I didn't make it—he caught my arms on the sill—but I screamed and yelled enough to get the attention of neighbors. It still didn't stop completely. He explained to neighbors it was just a spat and pulled me in broken and bruised and bleeding—and pulled all the phones from the plugs and made me sit next to him. He gave me the usual threats and then sat there until he knew that I had to pick up the children from daycare so that I would not go to the police or hospital. He followed me to the daycare after making me clean up as best as possible—and left from the daycare. The old me may have

listened in fear, but the new me was determined to pursue my new life without fear.

As soon as I was certain that he was well on his way home almost 200 miles away I made my way down the hallway. There I told the daycare that I was in a car accident and might they please hold my children for a bit longer so that I could get to the doctor. They only had to look at me to agree to help. After receiving medical attention, once again the police were called, and I was prepared for the usual. This town was different. This officer explained to me that he could help me simply by getting evidence of my injuries and the obvious evidence of a struggle in my home. I may still be asked to testify, he explained, but in a case such as this the evidence might speak for itself. I proceeded to press charges and the officer took pictures of my injuries and my home—for the first time. It was again humiliating and degrading but went to trial and for the first time my abuser was charged and convicted of battery.

I was subpoenaed to testify but never needed to—the evidence did speak for itself. I can't describe the feeling of how it felt, after so long, that someone believed me—and that someone had taken action so that I possibly wouldn't have to suffer anymore. I also can't explain how relieved I was that I would not have to testify. Today, even ten years later, after years of counseling to become whole again—I still have a hard time facing him in court in matters facing the children. Over ten years after my last beating it still makes me throw-up when I have to face him. I break out in a horrible, drenching cold sweat. I shake from the tips of my fingers to toes—of which I usually have to consciously place on the ground with force to stop my heals from clacking in the courtroom. Time can heal the wounds from the past but nothing can stop the fear that I have of this man. I often have to seek medical attention afterwards for migraines. No victim should have to face their antagonist. Fear—not the abuse

itself—is the major part of abuse that keeps a victim in their helpless position. This position should not be a part of the case in the court room. I am still thankful that I did not have to testify on the day that my abuser was convicted of his crime. I can't imagine the fear that I would've felt then. That fear has been used as a proficiently as any knife or gun might be used by a marksman or hunter. While a true weapon such as a knife, or gun may be used as part of the package, the look, the voice, or the words of the abuser serve as just as much a fear stimulator—and those that have been at it for a while are expert fear marksmen. Through the words of my story and others, I hope that the magnitude of that fear is realized—Thank you so much for listening to my story!

LETTER 21 FROM: ANONYMOUS VICTIM

I didn't realize I was a victim to domestic violence until I was almost killed. I lived with this man for two years and we always had confrontations, never anything physical, about the changes he wanted me to make. He would make statements that I didn't know how to be a woman, or criticize me on the way I cooked, washed clothes, cleaned house, communicate, dress, wear my hair, raise my child, everything. He would criticize my childhood, or my family as being faulty in some way. And just to let you know I am compulsive when it comes to cleaning and completing what I began. And me being set in my ways would show a stubborn side and to some degree try and change for the good of the relationship, but pretty much stay true to who I am.

Well, after the years of trying to control who I was as a person I decided to end the relationship and it took three months for him to get out of my home. But I had to give him one last moment of speaking his peace and trying to convince me that ending the relationship would be wrong. After his speach I told him to leave his key on the table and get his things.

He left his key but went to his car and brought back a 45 caliber hand gun. Forcing me in the bedroom and constantly threatening me with the weapon, I convinced him to go to the kitchen to cut off the stove. I ran to the front door and he caught me and he beat me with his fist and the weapon for approximately 15 minutes. Then I got away and ran to the balcony and jumped off from the second floor. He shot at me while I jumped off the balcony and shot me. Then he chased me through the area I lived and after shooting me twice in the left thigh and once in the right thigh, I fell, then he stood over me and shot me two more time. The gun jammed twice so that was two 45 caliber bullets that did not go into me. I was shot six times by a man that I just did not want to be with any longer.

But, what I realized was that I was in an abusive relationship for two years, after the fact. will I testify when he comes to court, yes, I'm looking forward to telling my story and him getting as much time permitted. Do I fear for my life and the life of my child, yes. I've changed my phone number about 5 times since the incident, and I've changed my address. I have anxiety attacks, and am paranoid with noises and sounds.

LETTER 22 FROM: ANONYMOUS VICTIM

I was married in May 2002; I discovered I was pregnant in August 2002. In October 2002, my husband assaulted my in my first trimester. He withheld medical care, transportation and communication to others from me. He neglected me physically, mentally, emotionally and financially. This started shortly after the pregnancy.

In the October 2002 assault, I called 911 and when offered to press charges, I declined as I asked for more time to think about it—I was in shock at the time. A couple weeks later, I decided that I should press charges and went through with it.